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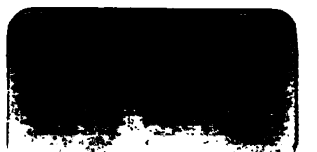
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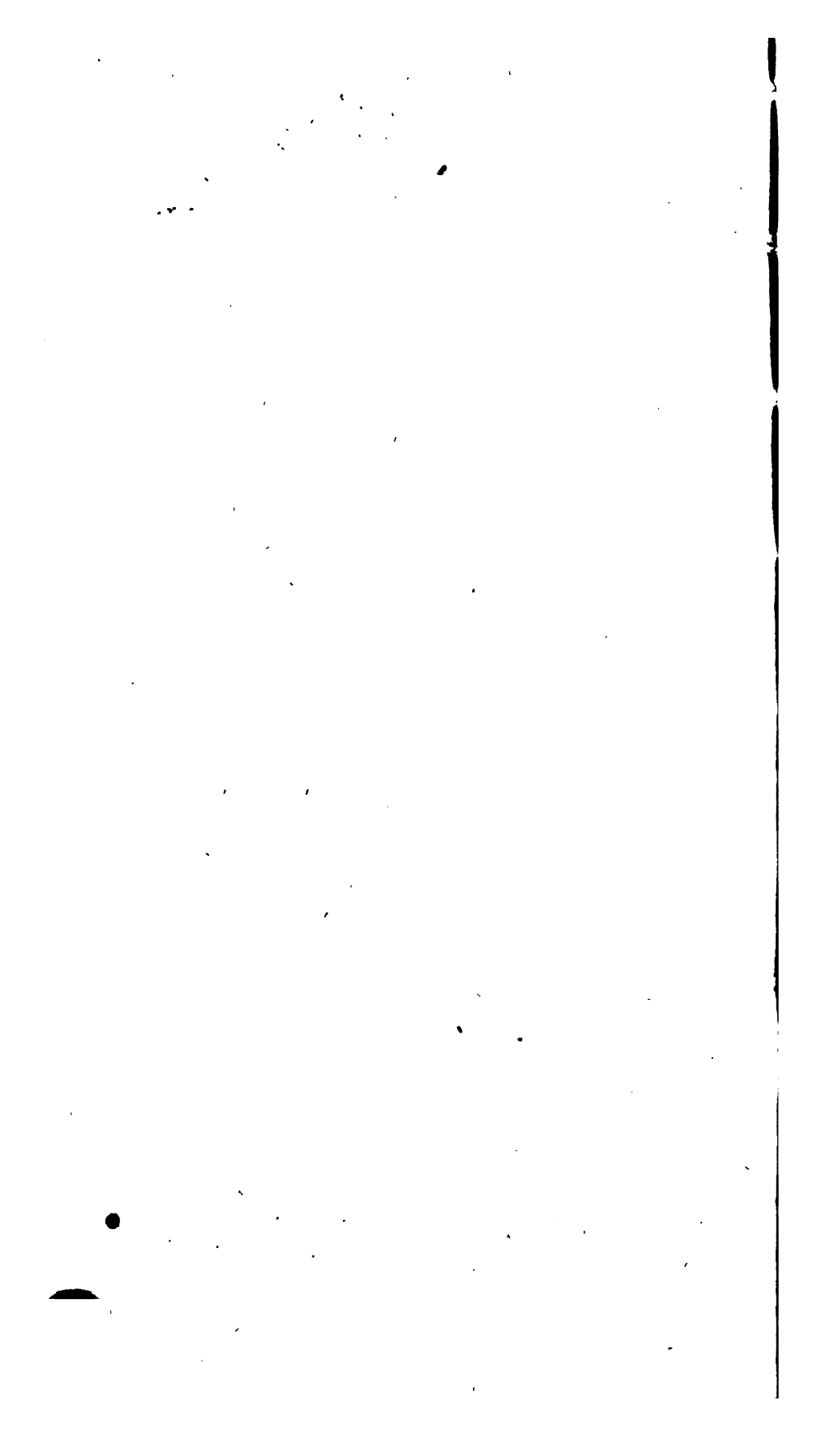


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# CONSIDERATIONS

ON THE

INEXPEDIENCY

OF THE

*Andrew B. Dyrie*  
*Aberdeen Jan. 13. 1876*

## LAW OF MARRIAGE

IN

SCOTLAND.

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By PATRICK IRVINE, Esq.

WRITER TO THE SIGNET.

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## APPENDIX.

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FOURTH LATERAN COUNCIL, ANNO, 1215.

INNOCENT III. POPE.

CAPUT 51.

*De pœna contrahentium Clandestina Matrimonia.\**

CUM inhibiti copulæ conjugalis, sit in tribus ultimis gradibus revocata : eam in aliis voluimus districte observari. Unde predecessorum nostrorum inhærendo vestigiis, clandestina conjugia penitus inhibemus : prohibentes etiam nequis sacerdos talibus interesse præsumat. Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando : Statuimus, ut cum matrimonia fuerint contrahenda, in ecclesiis per presbyteros publice proponantur, competenti termino præfinito, ut infra illum, qui voluerit, et valuerit, legitimum impedimentum opponat. Et ipsi presbyteri nihilominus investigent, utrum aliquod impedimentum obsistat. Cum autem probabilis apparuerit conjectura contra copulam contrahendam, contractus interdicatur expresse, donec quid fieri debeat super eo manifestis constiterit documentis.

\* Sacro Sancta Concilia, tom XI. p. 202.

Si qui vero hujusmodi clandestina vel interdicta conjugia inire præsumpserint in gradu prohibito, etiam ignoranter: soboles de tali conjunctione suscepta, prorsus illegitima cenceatur, de parentum ignorantia nullum habitura subsidium, cum illi taliter contrahendo non expertes scientiæ, vel saltem affectatores ignorantæ, videantur. Pari modo illegitima proles cenceatur, si ambo parentes impedimentum scientes legitimum, præter omne interdictum in conspectu ecclesiæ contrahere præsumpserint.

Sane parochialis sacerdos qui tales conjunctiones prohibere contempserit, aut quilibet etiam regularis qui cis præsumpserit interesse, per triennium ab officio suspendatur, gravius puniendus, si culpæ qualitas postulaverit. Sed et iis qui taliter copulari præsumpserint, etiam in gradu concesso, condigna pœnitentia injungatur. Si quis autem ad impediendum legitimam copulam malitiose impedimentum objecerit, ecclesiastica non effugiet ultione.

HONORIUS III. POPE, ANNO, 1217.

#### CAPUT 54.

##### *De Matrimonio Contrahendo.\**

Studeant Sacerdotes summopore et multipliciter matrimonium commendare per dignitatem, et bona ipsius matrimonii; amplexus fornicarios per contrarium reddendo detestabiles; confidenter asserentes matrimonium inter alia sacramenta quoad originem primum, et prius constitutum ab ipso Domino in Paradiso, &c.

Bona matrimonii sunt fides, proles, et sacramentum; scilicet fides ad torum, proles ad cultum Dei, Sacramentum Christi et Ecclesiæ: apparetque in hac vita maxime de-

\* Sacro Sancta Concilia, tom. XI. p. 262.

sirabile. Bonum est et privilegium matrimonium : nam sola proles, ex matrimonio legitimo suscepta a dignitatibus tam ecclesiasticis, quam civilibus, non est exclusa : cum tamen aliter geniti repellantur tanquam spurii.

## CAPUT 55.

*De Reverentia Matrimonii.\**

Propter hoc præcipimus, quod matrimonia cum honore celebrentur et reverentia : non cum risu et joco, non in tabernis potationibusve publicis, seu commensationibus ; nec quisquam annulum de junco vel quacunque vili materia, vel pretiosa, jocando manibus innectat muliercularum, ut liberius cum eis fornicetur : ne dum joculari se putat, honoribus matrimonialibus se adstringat. Nec de cætero fides detur alicui de matrimonio contrahendo, nisi coram sacerdote aut tribus vel quatuor personis fide dignis, propter hoc convocatis ; ita quod nullatenus per verba de præsentì contrahant : nec post matrimonium per verba de futuro contractum carnaliter commisceantur, nisi rite canonibus denunciationibus præmissis, tam ubi mas, quam ubi fœmina retro conversati sunt. Nihilominus etiam quoniam non mediocriter turbant ecclesiam Dei, et pericula animabus ingerunt taliter contrahentes : Statuimus quod quales ad nos transmittantur ; et ii, qui hujus modi contractibus intersunt prohibitis et auctoritatem et consensum præstiterint : et nos illis ad sedem Apostolicam transmittemus tanquam perturbatores ecclesiasticæ pacis, et contemptores ecclesiasticorum mandatorum. Et hoc statutum præcipimus omni die Dominicâ populo denunciari.

\* Sacro Sancta Concilia, tom. XI. p. 262.

## CAPUT 56.

*De forma Contrahendi Matrimonia.\**

Item præcipimus, quod sacerdotes doceant personas contrahentes hanc formam verborum in Gallico vel Anglico : *Ego N. accipio te N. in meam.* Similiter et mulier dicat *Ego accipio te in meum.* In his enim verbis consistit vis magna, et matrimonium contrahitur. Nec sine trina denunciatione publice facta in ecclesia et solenniter, præsumat sacerdos aliquas conjungere personas matrimonialiter. Pro quibus denunciationibus faciendis nihilomino exigatur.

Sed si utraque persona conjuganda, omnino fuerit incognita : nullo modo præstet sacerdos auctoritatem tali contractu, nisi prius ei legitime constiterit quod personæ legitimæ sint ad contrahendum. Similiter si altera illorum incognita fuerit, literas habeat testimoniales, quod possit legitime contrahere, et trina facta fuerit denunciatio in parochia illius.

## CAPUT 57.

*De Clandestinis Matrimoniis.†*

Prohibemus similiter clandestina matrimonia, præcipientes quod publice fiant in facie ecclesiæ, præsentem sacerdote ad hoc vocato ; si vero secus actum fuerit, non approbentur, nisi de nostra speciali auctoritate. Sacerdos autem qui tales conjunctiones prohibere contempserit, vel talibus interesse præsumpserit, vel quilibet alius regularis secundum statuta concilii, ab officio per triennium suspendatur ; gravius puniendus, si culpæ qualitas postulaverit. Sed et iis qui taliter copulari præsumpserint, etiam in gradu concessio condigna poenitentia injungatur.

\* Sacro Sancta Concilia, tom. XI. p. 262.

† *Ibid.* tom. XI. p. 263.

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publice et in facie ecclesiæ præsentē sacerdote. Si vero secus actum fuerit, factum non admittatur in ecclesia, nisi de speciali auctoritate nostra. Sacerdos autem cum contra hujus statuti nostri formam aliquos matrimonio copulaverit, ab omni officio suspendatur, nec relaxatur nisi de speciali mandato nostro. Nec fides de aliqua desponsanda detur nisi præsentē sacerdote. Quod si aliter factum fuerit, decrevimus contractum non tenere et personæ legitime puni-entur.

Prohibeat autem quilibet sacerdos publice omnibus de parochia sua, ne clanculo fidem præstent de matrimonio contrahendo, sed publice coram testibus idoneis, ut fidem præstitam, si necesse fuerit, valeant comprobare. Propon-atque eis præmonendo quod sibi præcaveant; quia si talem fidem carnalis copula subsequatur, ecclesia hoc pro matrimonio habebit, et faciet tanquam matrimonium observari

Item doceant sacerdotes frequenter populum, et prohibeant sub anathemate, ne alteruter conjugatorum transeat ad religionem, nec recipiatur, nisi per nos aut per licentiam nostram.

Item moneant mulieres conjugatas ne faciant vota, nisi cum magna deliberatione et cum consensu virorum suorum, et de concilio proprii sacerdotis

GREGORY IX. POPE, ANNO, 1240.\*

#### CAPUT 13.

##### *De Matrimonio.\**

Quia vero filius Adæ post lapsum mundatis unda baptis-matis, et per episcopum spiritu sancto in confirmatione roboratis, et salutari viatico sustentatis, lethalis concupis-centiæ lex inhæsit, sine qua non sit carnalis commixtio :

\* Sacro Sancta Concilia, tom. XI. p. 578.

propter hæc humana generativa quidem tota corrupta, concessum fuit matrimonium in remedium, quod institutum fuit prius ad officium. Hoc autem sacramentum, quia figurat sacramentum quod est inter Christum et Ecclesiam, est equidem et veneratione dignum, et a fidelibus omni scriptiōne celebrandum præhabita: præsertim cum ex errore contrahentium, et eorum, qui ipsis assistant, lites inextricabiles oriantur; propter quod, juxta Statuta Concilii Statuimus, ut nullum matrimonium fiat, nisi præcedent in ecclesia trina denunciatione solemnī. Noverintque sacerdotes, qui hoc statutum violari presumpserint, se per triennium ab officio suspendendos. Hæc autem intelligimus, non solum de matrimoniis solenniter celebratis; sed etiam de iis quæ aliter fiant, dum tamen contractum fuerit matrimonium per verba de præsentī.

## CAPUT 14.

*De transgressoribus Matrimonii.\**

Injungimus etiam Sacerdotibus, quod districte inhi-beant parochianis suis, ne etiam Sponsalia contrahant, vel contrahentibus assistant, fide data per verba de futuro, nisi jejuna saliva, testibus dignis, adhibiti sin præsentia Sacerdotis; quod si secus egerint mittantur ad Episcopos puniendi.—Nec extranea persona, de qua per denunciationem constare non potest an legitima sit, ad contrahendum matrimonium aliquatenus admittatur; nisi super hoc, per licentias Prælati, sub cujus jurisdictione prius steterant, fidem faciat Archidiacono loci, vel Episcopo, vel Officialibus eorundem. doceanturque conjugati bona conjugii, nec non et quomodo debeant suos, in timore Domini, Parvulos educare,—Provideantque Capellani insuper, quod secundo nubentibus benedictionem solennem de cætero non impendant, si pœnas

\* Sacro Sancta Concilia, tom. XI. p. 578.

canonicas voluerint evitare.—Prohibeanturque, singulis diebus Dominicis, per Presbyteros, tam matres quam nutrices, juxta se pueros teneros collocare præsumant, ne forte contingat per eorum incuriam pueros suffocari sed in cunabulis firmiter jaceant fulciendis.

Sponsis etiam prohibemus sub pœna excommunicationis, ne, antequam matrimonium celebretur, carnaliter misceantur. Quod si fecerint, si de contractu matrimonii contra prædictam formam, coram quibuscunque judicibus fuerit judicialiter tractatum, partem agentem, licet obtinuerit, pœnis subscriptis volumus subjacere: videlicet; quod quater in anno veniant ad ecclesiam Cathedralem, tam coram atrio ecclesiæ, quam in vicis præcipuis civitatis disciplinam publicam recepturi. In aliis diebus feriandis quotidie in parochia propria similem subeant disciplinam.

## CORPUS JURIS CANONICI.

DECRET. GREGORY IX. Lib. IV. t. 3. c. 3.

*Cum matrimonia sunt contrahenda, debent per Presbyteros in Ecclesia, edicta proponi assignato termino, intra quem qui voluerit impedire impedimentum opponat, et si probabilis conjectura fuerit de impedimento, interdicatur matrimonium, donec de hoc cognoscatur.*

Cum inhibitio copulæ conjugalis sit in ultimis tribus gradibus revocata, eam in aliis volumus districte servari. Unde prædecessorum nostrorum vestigiis inhærendo, clandestina conjugia penitus inhibemus, prohibentes etiam, ne quis sacerdos talibus interesse præsumat. Quare specialem quorundam locorum consuetudinem ad alia generaliter prorogando, statuimus ut cum matrimonia fuerint contra-

henda, in ecclesiis per Presbyteros publice proponantur competente termino præfinito; ut intra illum qui voluerit, et valuerit, legitimum impedimentum opponat, et ipsi Presbyteri nihilominus investigent, utrum aliquod impedimentum obsistat. Cum autem apparuerit probabilis conjectura contra copulam contrahendam, contractus interdicatur expresse, donec quid fieri debeat super eo, ex manifestis constiterit documentis.

Si in gradu prohibito matrimonium clandestine vel interdictum, de quo supra, contractum fuerit, etiam per ignorantes de impedimento, nati ex illo matrimonio sunt illegitimi. Idem est si ambo parentes sciunt impedimentum matrimonii, licet in conspectu Ecclesiæ contrahant.

Si quis vero hujusmodi clandestina vel interdicta conjugia inire præsumperit, in gradu prohibito etiam ignoranter, soboles de tali conjunctione suscepta prorsus illegitima cenceatur, de parentum ignorantia nulla habituro subsidium: cum illi taliter contrahendo non expertes scientiæ vel saltem affectatores ignorantiae videantur. Pari modo proles illegitima cenceatur, si ambo parentes impedimentum scientes legitimum, præter omne interdictum etiam in conspectu ecclesiæ contrahere præsumperint.

Sacerdos, qui contempserit prohibere matrimonia interdicta; et quilibet clericus etiam regularis, qui interfuit, per triennium a beneficio suspenduntur, et si culpa exegerit, etiam gravius puniuntur; ipsi etiam contrahentes contra hoc caput, etiam alias licite puniendi sunt et idem in calumniose denuntiantibus. Hoc dicit usque ad finem *Abbas*.

Sane si Parochialis Sacerdos tales conjunctiones prohibere contempserit, aut quilibet etiam regularis, qui eis præsumperit intercasse, per triennium ab officio suspendatur, gravius puniendus, si culpæ qualitas postulaverit. Sed his, qui taliter presumpserint, etiam in gradu concessio copulari, condigna pœnitentia injungitur. Si quis autem ad impe-

diendam legitimam copulam, malitiose impedimentum ob-  
jecerit, canonicam, non effugiet ultionem.

HONORIUS IV. POPE, ANNO 1286.

*De Corrigendis et Dirimendis Matrimoniiis.\**

In primis ad instar prædecessorum nostrorum, nos Archiepiscopus Simon, cum suffraganeis nostris, de concilio, et assensu totius concilii, Statuimus, quod Judices ecclesiastici, ad quos spectat cognitio et definitio causarum matrimonialium, in corrigendis et dirimendis matrimoniis, cum omni maturitate et consilio Peritorum procedant: et quod matrimonia illicite contracta, timore vel amore nullatenus sustineant, sed ad illa separanda, omni dilatione et excusatione exclusa, procedant; Capellani autem parochiales, matrimonia, quæ in suis parochiis illicite contracta cognoverint, studeant diæcesanis, aut eorum officialibus, quam citius commode potuerint, intimare: quod nisi fecerint, superiorum suorum arbitrio graviter puniantur.

CANONS OF SCOTCH PROVINCIAL COUNCILS, HELD AT  
PERTH FROM 1242 TILL 1269.

ARTICLE 65.

*De Matrimonio.*

Quum matrimonium ab ipso Deo in Paradiso noscitur institutum, et quoad originem primum est inter alia sacramenta; ut liberius et canonicè de cætero contrahatur,—Præcipimus ut nulli detur fides de matrimonio contrahendo, nisi coram sacerdote, et tribus vel quatuor viris fide dignis, ad hoc specialiter convocatis. Nullus sacerdos præsumat aliquas personas matrimonialiter conjungere, nisi prius

\* Sacro Sancta Concilia, tom XI. p. 1247.

trina denunciatione in ecclesia, publice et solenniter præmissa, secundum formam Concilii Generalis; ita quod qui voluerit, et valuerit, legitimum impedimentum opponat. Inhibeant etiam sacerdotos sub pœna excommunicationis, ne quis celet impedimenta matrimonii malitiose, et ne quis malitiose matrimonium impediat. Ipse etiam presbyter nihilominus investiget, utrum aliquod impedimentum obsistat. Cumque apparuerit probabilis conjectura contra copulam contrahendam, contractus interdicatur expresse, donec quod fieri debeat super eo, manifestis constiterit documentis. Clandestina quoque matrimonia fieri prohibemus inhibentes ne quis sacerdos talibus interesse præsumat; et qui contra hæc fecerit, canonicè puniatur. Denuncient etiam presbyteri parochianis suis, quod matrimonium prohibitum est infra quartum gradum consanguinitatis vel affinitatis:—ultra quartum gradum legitime contrahitur. Inter compadres et commatres, et inter filium et filiam, et inter susceptum et susceptam, et filium et filiam suscipientis matrimonium interdicimus.

Statuimus etiam ut cappellani parochianos suos publice fornicarios statim compellant, cum fornicariis suis contrahere, aut eas simpliciter abjurare nulla conditione adjecta

CANONS BY THE COUNCIL OF TRENT REGARDING  
MARRIAGE, 24TH SESSION, ANNO 1563.

CANON I.

*De Sacramento Matrimonii.\**

Si quis dixerit, matrimonium non esse veto et proprium ex septem legis evangelicæ sacramentis, a Christo Domino institutum, sed ab hominibus in ecclesiis inventum, neque gratiam conferre—Anathema sit.

\*. *Sacra Sancta Concilia*, tom. XIV. p. 874.

## IV.

Si quis dixerit, ecclesiam non potuisse constituere impedimenta matrimonium dirimentia vel in iis constituendis errasse—Anathema sit.

## XI.

Si quis dixerit, prohibitionem solemnitatis nuptiarum certis anni temporibus superstitionem esse tyrannicam, ab ethnicorum superstitione profectam, aut benedictiones et alias ceremonias, quibus ecclesia in illis utitur damnaverit—Anathema sit.

## XII.

Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos—Anathema sit.

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DECREE OF THE COUNCIL OF TRENT, 24<sup>TH</sup> SESSION,  
ANNO 1563.

## DECRETUM DE REFORMATIONE MATRIMONII.\*

## CAPUT I.

*Matrimonii solenniter celebrandi forma Concilio Lateranensi præscripta innovatur; quoad proclamationes dispensare possit Episcopus. Qui aliter quam præsentibus parochi et duobus vel tribus testibus contrahit, nihil agit.*

Tametsi dubitandum non est, clandestina matrimonia, libero contrahensium consensu facta, rata et vera esse matrimonia, quamdiu ecclesia irrita non fecit; et proinde jure damnandi sint illi; ut eos sancta synodus anathemate

\* Sacro-Sancta Concilia, tom. 14. p. 876.

damnat qui ea vera ac rata esse negant, quique falso affirmant matrimonia a filiis familias sine consensu parentum contracta irrita esse, et parentes ea rata vel irrita facere posse; nihilominus sancta Dei ecclesia ex justissimis causis illa semper detestata est atque prohibuit. Verum cum sancta synodus animadvertat, prohibitiones illas propter hominum obedientiam jam non prodesse, et gravia peccata perpendat, quæ ex iisdem clandestinis conjugiiis ortum habent, præsertim vero eorum qui in statu damnationis permanent, dum priore uxore, cum qua clam contraxerant, relictâ, cum alia palam contrahunt et cum ea in perpetuo adulterio vivunt: cui malo, cum ab ecclesia, quæ de occultis non judicat, succurri non possit, nisi efficacius aliquod remedium adhibeatur; idcirco sacri Lateranensis Concilij sub Innocentio III. celebrati vestigiis inhærendo, præcipit, ut in posterum, antequam matrimonium contrahatur, ter a proprio contrahentium parochâ tribus continuis diebus festivis in ecclesia inter missarum solemnias publice denuntiatur inter quos matrimonium sit contrahendum; quibus denuntiationibus factis, si nullum legitimum opponatur impedimentum, ad celebrationem matrimonii in facie ecclesiæ procedatur. Ubi parochus viro et muliere interrogatis, et eorum mutuo consensu intellecto vel dicat, Ego vos in matrimonium conjungo in nomine Patris, et Filii, et Spiritus Sancti, vel aliis utatur verbis, juxta receptum unius cujusque provincie ritum. Quod si aliquando probabilis fuerit suspicio, matrimonium malitiose impediri posse, si tot præcesserint denuntiationes, tunc vel una tantum denuntiatio fiat: vel saltem parochâ et duobus vel tribus testibus præsentibus matrimonium celebretur: deinde ante illius consummationem, denuntiationes in ecclesia fiant, ut si aliqua subest impedimenta facilius detegantur nisi ordinarius ipse judicaverit, ut prædictæ denuntiationes remittantur, quod illius prudentiæ et judicio sancta synodus relinquit. Qui

aliter quam præsente parcho vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et hujusmodi contractus irritos et nullos esse decernit, prout eos præsenti decreto irritos facit et annullat. Insuper parochum vel alium sacerdotem, qui cum minore testium numero, et testes, qui sine parcho vel sacerdote hujusmodi contractui interfuerint, nec non ipsos contrahentes, graviter arbitrio ordinarii puniri præcipit; Præterea eadem sancta synodus hortatur ut conjuges ante benedictionem sacerdotalem in templo suscipiendam in eadem domo non cohabitent; statuitque benedictionem a proprio parcho fieri; neque a quoquam, nisi ab ipso parcho, vel ab ordinario, licentiam ad prædictam benedictionem faciendam alii sacerdoti concedi posse; quacunque consuetudine, etiam immemorabili, quæ potius corruptela dicenda est vel privilegio, non obstante. Quod si quis parochus, vel alius sacerdos, sive regularis sit, etiam si id sibi ex privilegio vel immemorabili consuetudine licere contendat, alterius parochiæ sponsos sine illorum parochi licentia matrimonia conjungere aut benedicere ausus fuerit, ipso jure tamdiu suspensus maneat, quamdiu ab ordinario ejus parochi, qui matrimonio interesse debebat, seu a quo benedictio suscipienda erat, absolvatur. Habeat parochus librum in quo conjugum et testium nomina, diemque et locum contracti matrimonii describat, quem diligenter apud se custodiat.

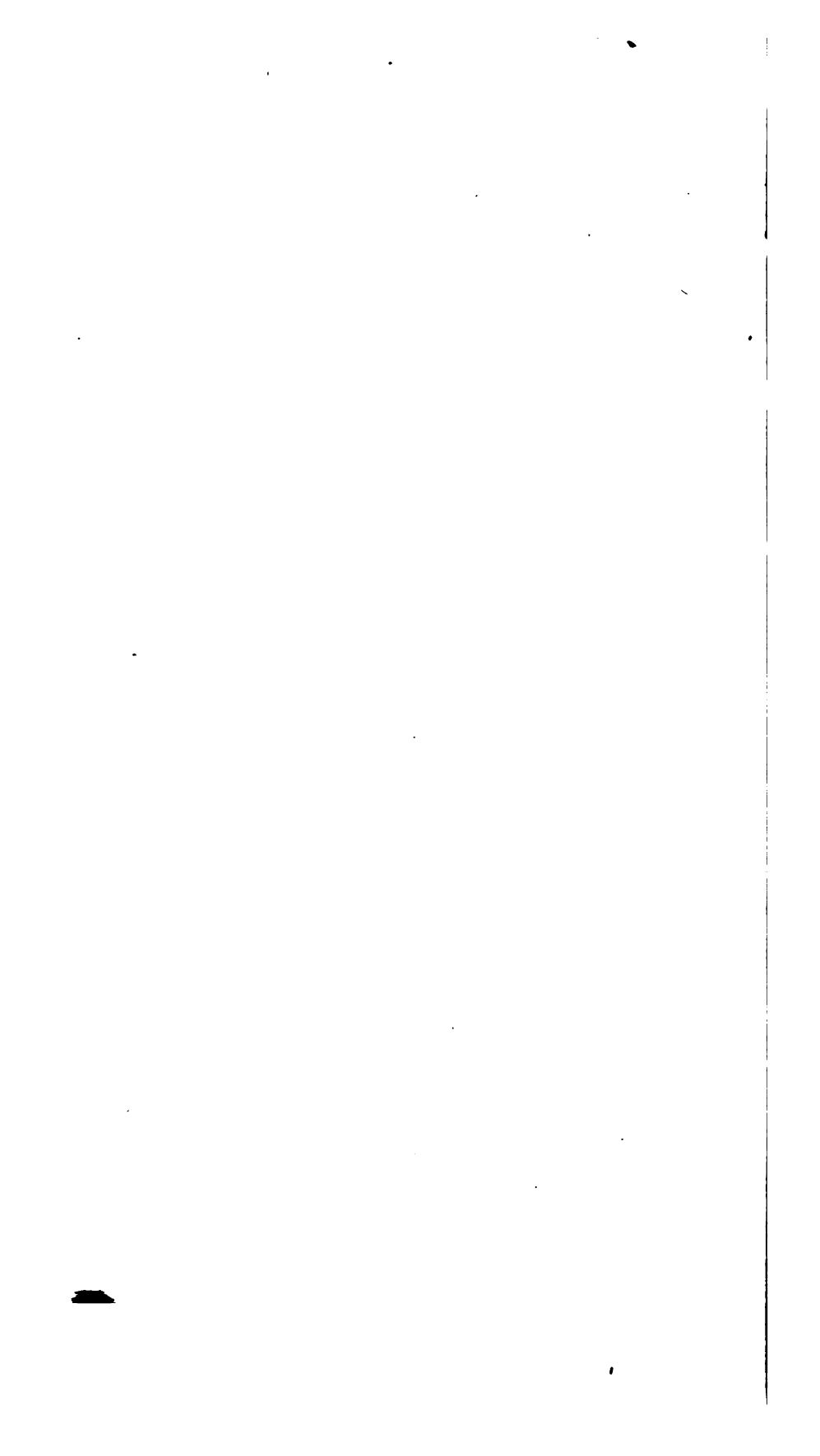
Postremo sancta synodus conjuges hortatur ut antequam contrahant, vel saltem triduo ante matrimonii consummationem, sua peccata diligenter confiteantur, et ad sanctissimum Eucharistiæ sacramentum pie accedant. Si quæ provincie aliis ultra prædictas, laudabilibus consuetudinibus et ceremoniis hac in re utantur, eas omnino retineri, sancta synodus vehementer optat. Ne vero hæc tam

salubria praecepta quemquam lateant, Ordinariis omnibus praecepit, ut cum primum potuerint, curent hoc decretum populo publicari ac explicari in singulis suarum diæcesum parochialibus ecclesiis : idque in primo anno quam sæpissime fiat :—deinde vero quoties expedire viderint. Decernit insuper, ut hujusmodi decretum in unaquaque parochia suum robur post triginta dies habere incipiat, a die primæ publicationis in eadem parochia factæ numerandos.

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## **CONSIDERATIONS**

**ON THE INEXPEDIENCY OF THE LAW OF MARRIAGE**

**IN**

**SCOTLAND.**

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### **INTRODUCTION.**

**IN** no respect is the human race distinguished in a more remarkable manner, from all the inferior orders of animal creation, than in the constitution of their nature, which leads to gradual and progressive improvement in their condition; from the habits of rude and barbarous life, to those of civilization and refinement, and to a permanent union between the sexes. The connexion which takes place in every other class of living beings instinctively continues so long as necessary for the preservation of the species, and terminates with the limited period when that purpose is accomplished. The parent and the offspring then become unconscious of any reciprocal connexion,

and mix indiscriminately in the general mass of their kind. The same instinctive powers, by which the parents have been directed, continue to guide the progeny, uninstructed and incapable of improvement, by acquired knowledge or experience. But the human race, formed for a higher destiny, and endowed with the faculty of reason, acting in combination with instinctive feeling, preserve through life sympathies and affections, arising from their relative connexion, and communicate to succeeding generations the improvements which take place in their own. These improvements progressively continue, unless obstructed by unpropitious events, or destroyed by some irresistible and overwhelming calamity.

The mental, as well as the corporeal powers of the human race, are of slow growth, and require the united exertions and superintending care of both parents to call their energies into full and beneficial action. In the uncontrolled dominion of the one sex, or in the divided influence of both sexes in the matrimonial union, the progress of society may be traced from the period when it emerges from the rude and barbarous state of savage life, till it attains the highest degree of civilization and refinement, of which experience bears testimony. Upon the united and uninter-

rupted exertions of both parents, during the period of an indissoluble union, depend not only their mutual happiness, but the early acquirements and habits of succeeding generations. In the language of poetry, Milton has beautifully described the influence of marriage upon society, and the blessings of domestic life connected with it :—

“ Hail, wedded love, mysterious law, true source  
“ Of human offspring, sole propriety  
“ In Paradise, of all things common else ;  
“ By thee adult’rous lust was driv’n from men  
“ Among the bestial herds to range ; by thee,  
“ Founded in reason, loyal, just, and pure,  
“ Relations dear, and all the charities  
“ Of father, son, and brother, first were known.  
“ Far be it that I should write thee sin, or blame,  
“ Or think thee unbecoming holiest place,  
“ Perpetual fountain of domestic sweets,  
“ Whose bed is undefiled, and chaste pronounced,  
“ Present or past, as saints and patriarchs used ;  
“ Here love his golden shafts employs, here lights  
“ His constant lamp, and waves his purple wings,  
“ Reigns here and revels”——

The law of a country, regarding marriage, by which the rights and duties of the whole members of the community must be regulated and controlled in matters of such vital importance and universal application, involving the interests most dear to man, in all ranks and classes of society, cannot be too anxiously considered, for the purpose and with the view of preserving and increasing its benefits, and removing its defects.

Lord Kames has said, that “few branches of our law are handled with less precision than what particulars are necessary to complete a marriage.”\* Since the period when he published his *Elucidations*, many perplexing and painful discussions have occurred upon that subject. From these it will appear, that the principles of law, which are now more fully recognised, than at the period alluded to, are, in some respects, in their practical application, attended with consequences injurious to the best interests of society; and are, in various respects, inconsistent with, or defective, in the full protection and security which individuals ought to receive, against the hazards of fraud or deception, and against the hazard of uncertainty in the forms necessary for establishing the validity of marriage. It may, therefore, be useful to trace the law of Scotland upon the subject of marriage—to its origin, and in its progress and consequences—to mark its excellence in those particulars in which it deserves commendation—to point out its existing defects—and to suggest, for these defects, a remedy for the consideration of those who are qualified to judge. Such is the design of the following chapters.

\* *Elucidations*, Article 5.

## CHAPTER I.

### SKETCH OF THE GENERAL PRINCIPLES UPON WHICH THE LAW OF MARRIAGE SHOULD BE REGULATED.

THE institutional writers upon the law of Scotland concur in treating marriage as a consensual contract, but have not attempted to give any accurate definition of what is essential to its constitution. Chap. I.

According to Pothier\*, an eminent French jurist, marriage is defined to be a contract, carried into execution, with the forms which the laws have prescribed, by which a man and a woman, capable of entering into the contract, reciprocally engage towards each other to continue during their lives in the union which ought to subsist between husband and wife. He adds, that it follows, from the above definition, that a marriage, in which all the formalities required by law for its validity, have not been observed, or which has been contracted between persons whom the laws have declared incapable of entering into such contract, is not a real marriage. His words are, “ On peut définir  
“ le mariage, un contrat revêtu des formes que les  
“ lois ont prescrites, par lequel un homme et une  
“ femme habiles à faire ensemble ce contrat, s’en-

\* Tom. III. p. 130, *Traité du Contrat de Mariage*.

Chap. I. "gagent réciproquement l'un envers l'autre à  
"demeurer toute leur vie ensemble dans l'union  
"qui doit être entre un époux et une épouse.

"Il suit de cette définition, qu'un mariage où  
"l'on n'auroit pas observé quelque'une des formali-  
"tés que les lois requierent pour sa validité, ou  
"qui auroit été contracté entre des personnes que  
"les lois rendent inhabiles, n'est pas un véritable  
"mariage."

Agreeably to the above definition, as given and explained by Pothier, it is open for the supreme authority, in every state, to adopt such regulations, for the constitution and proof of marriage, as are best adapted to the manners and habits of the people, and calculated to promote the benefit and good order of society. It has long been an established maxim, that marriage should be favourably regarded by the law, and that it should not be impeded by tedious, troublesome, or expensive formalities, tending to obstruct parties in giving effect to their matrimonial intentions.

While this maxim is admitted to its fullest extent, in so far as regards the facility of contracting marriage, without unnecessary impediments, it should also be duly considered, on the other hand, what precautions it is proper to take before the law gives its sanction to an engagement, irrevocable in its nature, and carrying along with it the most important consequences to the parties themselves—to others with whom they are or may be connected—to society—and to future generations.

In so far as regards the rights and interests of the parties themselves, it is obvious that, in order to constitute marriage, the matrimonial consent should not only be given with deliberation at the moment of expressing it, but, in a matter of such deep importance, it should be given in a manner which secures previous deliberation, and that, whatever formalities the law may require in the mode of expressing consent, it should be so expressed that neither party can, at the time, entertain a doubt as to the validity of the engagement into which they solemnly enter. If it be allowable to express consent in a manner ambiguous or evasive, so as to mislead, or in a manner which renders evidence of doubtful or of difficult attainment, the important rights of the contracting parties are not duly protected. Chap. I.

2dly, In so far as regards consequences affecting others, with whom the parties are or may be connected, it is of the utmost importance that the matrimonial consent should be given in a manner, and accompanied with evidence easily accessible; so that the rights and interests and the domestic happiness of others, may not be exposed to the imminent hazard which arises from any uncertainty with regard to the effects of previous latent subsisting engagements, whether that hazard may arise from the fraud of one of the contracting parties, or from causes of a less culpable nature, in consequence of uncertainty attending the legal effects resulting from previous conduct.

Chap. I.     3d, In so far as regards the rights of society, it is of the utmost importance that the law, regarding a contract of a nature so general and comprehensive, as to embrace the rights of every individual in the community, in its immediate or remote consequences, ought to be such as is best calculated to promote the peace and good order of society—to impress upon the minds of the contracting parties, the important duties which flow from an irrevocable and indissoluble engagement—to cherish and encourage moral habits—and to repress licentiousness, and the frequent necessity of discussions arising from licentious conduct.

4th, In so far as regards the rights and interests of future generations, it is of the utmost importance that questions of disputed legitimacy should be avoided, by rendering the proof of marriage so easily accessible, by means of public records, that the claims of future generations by inheritance in the course of lawful descent, may be traced in the most certain and effectual manner.

It will be considered, in the subsequent chapters, in what respects the law of Scotland seems to be inexpedient with regard to any of the important objects which have now been stated; and some suggestions will be made for consideration as to the remedy which may be applied to remove such defects as may appear prejudicial to the interests of the community.

## CHAPTER II.

ON THE VARIOUS MODES BY WHICH MARRIAGE MAY BE  
CONSTITUTED BY THE LAW OF SCOTLAND.

A sketch of the general principles, upon which Chap. II. the law of marriage ought to be regulated, has been given in the preceding chapter. In order to judge of the practical benefits derived from the subsisting law of Scotland upon the subject, and of the defects and inexpediency of any part of that system, it is necessary to bring distinctly into view the various modes in which marriage may be constituted in Scotland, and the nature of the evidence by which the constitution of marriage may be supported or established.

Marriage may be constituted in Scotland by any one of four different modes, separately, or combined with the other modes.

1. It may be constituted by appearing before an authorised clergyman, after the banns have been duly proclaimed, and adding the ceremony of a religious vow to the formal declaration of consent to a civil contract. This is termed a regular marriage; and it is the only mode of constituting marriage in Scotland which has received the direct sanction of legislative authority. Every other

## 10 VARIOUS MODES OF CONSTITUTING MARRIAGE.

Chap. II. mode of constituting marriage is reprobated by law, although the validity of the marriage may be established by means of legal evidence.

2. Marriage may be constituted by the expression of deliberate, voluntary, and irrevocable mutual consent *de præsenti*, by persons capable of giving such consent ;—subject to qualifications as to the evidence necessary to establish such consent.

3. Marriage may be constituted by promise *de futuro*, and subsequent sexual intercourse.

4. Marriage may be constituted by the parties living together in the acknowledged character of husband and wife ; or, as it is termed in the law of Scotland, by habit and repute.

Each of these modes of constituting marriage, or of establishing its constitution by legal evidence, is of sufficient importance in its effects and consequences to require to be separately stated, in order to mark their distinguishing peculiarities. The practical consequences arising from the various modes in which marriage may be contracted in Scotland, either separately, or in combination, will then be considered.

## CHAPTER III.

ON MARRIAGE CONSTITUTED BY PROCLAMATION OF  
BANNS AND CELEBRATION BY A CLERGYMAN.

THE essence of the matrimonial union being Chap. III.  
mutual consent, the leading object in every civilized state, must be, to fix upon the best and surest mode of ascertaining the deliberate, voluntary, and irrevocable expression of such consent, and of preserving permanently, plain and sufficient evidence of it. No particular form or ceremony has been prescribed, either in the Jewish dispensation, or by the Christian revelation, for constituting or establishing the matrimonial union. In the 18th chapter of Leviticus, marriage is declared unlawful between persons related by specified ties of kindred. In Christian countries, the prohibitions contained in the Levitical law have been adopted. In computing the degrees of kindred, in some respects not regulated by Divine law, the same rule has not been uniformly adopted in Christian countries. The degree of consanguinity, within which marriage was prohibited, has been occasionally altered by the authority of the Pope. Reasons, sufficiently whimsical, have been assigned for fixing upon the fourth degree, after various changes.

Chap. III. The reason mentioned in the 3d Lateran council, cap. 50, is, that the degrees of kindred, within which marriage is prohibited, thus correspond with the number of the elements.

By statute in the reign of James VI. of Scotland, marriage is declared to be as free as the law of God has permitted; and the Levitical law has been adopted in Scotland, as stated in the 18th chapter of Leviticus.

As man has been left by Divine Wisdom, restricted to a limited extent, as to the persons with whom he may contract marriage, but unassisted as to the forms proper for its constitution, it remains open for every state to adopt those regulations which are best adapted to its peculiar circumstances and situation.

During the dark ages which followed the commencement of the Christian era, the turbulence and ignorance of the period were not calculated to lead to serious reflection with regard to those obligations, which, in a more refined and enlightened state of society, deeply affect the happiness of individuals, and tend to uphold the established religion of the state and the morality of the country. The knowledge acquired by the clergy, and for a long period almost exclusively confined to their order, led to their ascendancy over mankind; and the consideration of the matrimonial engagement, as one of the most extensive influence, falling in a peculiar manner under their cognisance, naturally excited their attention.

The study of the Roman law had become pre-Chap. III.  
valent at the time when the subject of marriage engaged the attention of the Popish councils. The maxim of the civil law, that *consensus, non concubitus facit matrimonium*, appears to have been adopted in the canon law; and through that medium it has been introduced into the law of Scotland. But when that principle was adopted, precautions were at the same time taken, by which the mischievous consequences likely to arise from declaring that consent in a loose and vague manner, might be counteracted. Proclamation of banns was introduced by the authority of Popish councils; and the controlling power and influence of the church, promulgated by the supremacy of the Pope, and enforced by subordinate judicatories, diminished the hazard of injurious consequences to society, by adopting the maxim, that marriage *might* be constituted by consent, without celebration by a clergyman, or any forms calculated to excite the attention of others, and to require some time for deliberation by the contracting parties.

By the canon law, proclamation of banns was required, under severe penalties, as essential to marriage; and those contracting clandestine marriage, which was strictly prohibited, though not declared null, were exposed to rigorous church discipline and censure. The same regulations were adopted in Scotland at an early period. This historical fact seems to have been unknown,

Chap. III. or but little attended to, until Lord Hailes published, in 1769, the Canons of Scotch Provincial Councils, held at Perth, from 1242 till 1269. The 65th article introduces the proclamation of banns in the same manner as required by the canon law, and prohibits clandestine marriages. It likewise ordains the clergy to take measures for compelling those who live in a state of fornication, either to abjure such connexions, or immediately to contract regular marriage, instead of continuing illicit intercourse.

The institutional writers upon the law of Scotland have scarcely noticed the origin of this branch of our law; and Mr. Erskine \* has stated the introduction of it erroneously, in several important respects. He says, that the publication of banns was first introduced by the Lateran Council, in 1216, in general terms, without specifying in what churches, or how often the proclamation was to be made; and afterwards by the Council of Trent, which ordained banns to be proclaimed on three successive holidays, in the parish church or churches of the persons contracting; and that this canon was adopted by our first reformers, and has ever since been observed by our church.

It is of material importance to inquire into the origin of the proclamation of banns, and to trace the history of the law of Scotland upon the subject of the forms necessary to constitute a regular marriage.

\* B. I. vol. 10. p. 101.

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*J. H. H. H.*

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**Chap. III.** The proclamation of banns, previous to marriage, was introduced by the fourth General Lateran Council, held in 1215, during the pontificate of Innocent III. The regulation is contained in the 51st chapter of the Proceedings of that Council, under the title, "De Poena contrahentium Clan-  
"destina Matrimonia." The whole proceedings of the popish councils, applicable to the subject under consideration, will be found in the Appendix, to which reference shall be made without interrupting the narrative. The chapter, under the above title, contains an express prohibition against clandestine marriages. It provides that marriage shall not take place within the forbidden degrees of kindred; and that previous to marriage, banns shall be publicly proclaimed, so that any impediment to the marriage may be stated. Power is conferred upon the clergy to judge of these impediments; and it is declared, that the clergyman who shall presume to take part in such forbidden connexions, shall be suspended from his duties for three years, or more severely punished, if the case shall require it. It also provides, that the severest church censures shall be inflicted upon those who shall presume to form connexions in a clandestine manner, although not within the forbidden degrees of kindred.

Pope Innocent III. was elected to the papal chair in 1198, and Pope Honorius III., upon his death, in the year 1216. During their pontificates, several statutes were passed upon the sub-

ject of marriage. These are contained in the Ap- Chap. III.  
pendix; and in one of these, cap. 56, "De forma  
"contrahendi matrimonia," the words of the mar-  
riage ceremony now in use by the forms of the  
Church of England; are expressly appointed, and  
the clergy are prohibited from joining persons in  
matrimony, unless after proclamation of banns  
three times publicly made in the parish church.  
In the next statute, cap. 57, "De Clandestinis  
"Matrimoniis," clandestine marriages are prohi-  
bited; and it is declared, that marriage shall take  
place *in facie ecclesiae*, in presence of the priest  
called for that purpose, unless by special autho-  
rity. The priest, who shall fail to prohibit clandes-  
tine connexions, is to be suspended from his du-  
ties for three years, or more severely punished;  
and condign church censures shall be inflicted  
upon those, although not within the forbidden de-  
grees of kindred, who shall presume to con-  
tract marriage contrary to these statutes. It is  
declared by these statutes, that if any one shall  
maliciously impede lawful marriage, he shall not  
escape the punishment of the church.

The regulation of banns being proclaimed, so  
as to allow a reasonable time for stating any im-  
pediment to the proposed marriage, was thus esta-  
blished during the pontificate of Innocent III., and  
renewed in the pontificate of Honorius III., with  
the addition that banns should be three times pro-  
claimed in the parish church where the parties  
reside.

Chap. III. Pope Gregory IX. was elected to the pontifical chair in 1227; and the prevention of clandestine marriages continued to be an object of interest. In 1231, during his pontificate, a statute was passed, under the title, "*De Matrimoniis Clandestinis*," by which it is ordained,\* that the clergy shall proceed with the best advice, and shall, upon no account, either from fear or affection, support marriages contracted in a clandestine manner; but that, laying aside every cause of delay and excuse, shall proceed to put an end to all such marriages. The words are so explicit, that it may be proper to quote them:—"Statui-  
 " mus ut Prælati cum maturitate et concilio peri-  
 " torum procedant et quod matrimonia clam con-  
 " tracta nullatenus sustineant timore vel amore;  
 " sed ad illa dirimenda omni dilatione et excusa-  
 " tione exclusis procedant."

During the same pontificate, in the year 1237, the regulation of proclaiming the banns three times in the church, was again promulgated. After several prohibitions against marriage within the forbidden degrees, it is provided,† that marriage shall not be contracted by unknown persons, nor without proclamation published three times in church, nor in a clandestine manner; but publicly, and in face of the church, and in presence of the clergyman. It is farther provided, that if marriage be otherwise contracted, it

\* Sacro Sancta Concilia, tom. XI. p. 439. † Vide Appendix, p. 5.

shall not be admitted by the church, unless by the Chap. III. special authority of the Pope ; that the priest transgressing the statute, shall be suspended from his office, and shall not be restored unless by special mandate ; and that faith shall not be given to espousals, unless in the presence of the priest ; and it is decreed that such contract shall not be binding, and that the persons concerned in it shall be punished. The priest is farther prohibited from receiving promise of marriage between parties privately, or without proper witnesses to establish such promise by proof. The clergy were, however, enjoined to admonish parties to be cautious in their conduct ; because, if sexual intercourse shall follow such promise, the church will hold such connexion sufficient for the purpose of establishing marriage.

The distinction is thus acknowledged, between the actual constitution of marriage without celebration, and such consent as may lead to the subsequent constitution of it by competent authority. Another distinction is recognised between the effects of consent, followed by sexual intercourse, as founding a claim for marriage, and the expression of consent, without such intercourse. This decree is so important, that the statutory part of it shall be quoted. \*—“ *Nec contrahatur matrimonium inter personas incognitas, nec sine trina denunciantione in ecclesia publicata. Nec clandestina contrahantur matrimonia, sed publice, et in facie ec-*

\* *Sacro Sancta Concilia*, tom. XI. anno 1237.

Chap. III. "clesiæ præsentē sacerdote. Si vero sic actum  
 " fuerit factum non admittatur in ecclesia nisi de  
 " speciali auctoritate nostra. Sacerdos autem cum  
 " contra hujus statuti nostri formam aliquos matri-  
 " monio copulaverit, ab omni officio suspendatur,  
 " nec relaxetur nisi de speciali mandato nostro.  
 " Nec fides de aliqua despondenda detur, nisi præ-  
 " sente sacerdote. Quod si aliter factum fuerit, de-  
 " crevimus contractum non tenere, et personæ legi-  
 " time punientur.

" Prohibeat autem quilibet sacerdos publice om-  
 " nibus de parochia sua, ne clanculo fidem præstent  
 " de matrimonia contrahendo; sed publice coram  
 " testibus idoneis, ut fidem præstitam, si necesse  
 " fuerit, valeant comprobare. Proponatque eis  
 " præmonendo quod sibi præcaveant; quia si talem  
 " fidem carnalis copula subsequatur, ecclesia hoc  
 " pro matrimonio habebit et faciet tanquam ma-  
 " trimonium, observari."

The prohibition against clandestine marriage might thus be strongly enforced. The validity of marriage was made to depend upon complying with the forms prescribed by the rules of the church, or by obtaining the sanction of the church authorities, in all cases in which the regular mode of procedure was departed from. The controlling power and the influence of the church were established by their interpretation of different parts of various statutes as applicable to the conduct of parties.

The regulation with regard to the proclamation

of banns, three times previous to marriage, is repeated in the procedure of a synod, held in 1240, during the same pontificate. In the 13th chapter, "*De Matrimonio*," after stating the reasons that marriage should be considered as a sacrament, and the inextricable disputes which arise from the errors of contracting parties, the statute of the general council, requiring banns to be three times proclaimed in church, previous to marriage, is adopted. The next chapter, "*De Transgressionibus Matrimonii*," contains recommendations of the preceding statutes.

The prohibitions against clandestine marriages, and the regulations with regard to the proclamation of banns, previous to marriage, promulgated in the decretals by Pope Gregory IX., enforce the provisions ordained by the general councils during the pontificates of Innocent III. and Honorius III., and during his own pontificate. The only difference with regard to the proclamation of banns, is, that in the decretal, it is stated, that banns shall be proclaimed previous to the marriage, so as to allow sufficient time for stating any impediment to it, exactly in terms of the act of the General Council, during the pontificate of Innocent III. ; but it does not specify that the proclamation shall be made three times, as is provided by the subsequent councils during the pontificate of Honorius III.

In 1286, during the pontificate of Honorius IV., the prohibition against marriage, illegally contracted, was still farther enforced by a statute, in-

Chap. III. titled, *De corrigendis et dirimendis Matrimonis*,\* which declared, that the clergy should take cognisance of such connexions; and should be severely punished, if they omitted to do their duty. The statute repeats the directions contained in the statute of Pope Honorius III., above quoted, to proceed in putting an end to all such private marriages, without delay, fear, or affection, or any other excuse.

By the acts of the popish general councils, which have now been stated, marriage, unless in the form prescribed by the church, was strictly prohibited. The means of enforcing these prohibitions were most effectual. Marriage, otherwise contracted, was not declared to be absolutely null; but a discretionary and uncontrolled power remained with the clergy, to judge of the validity of all such marriages, and to inflict censure, according to their discretion. By the assumed right of granting dispensations, in cases of marriages within the forbidden degrees, and by leaving open appeals, in cases of marriage privately contracted, to be decided upon considerations of equity or expediency, popish influence and power were greatly increased, while the evils arising from private marriages, might in a great measure be guarded against and checked. The reasons assigned for popish dispensations, were to prevent family feuds, to quiet scandal, and other such causes; and the

\* Vide Appendix, p. 10.

dispensations were ascribed to the plenitude of Chap. III. power conferred, not by man, but by God. While these principles were acted upon, beyond control, the acts of general councils afforded the means of enforcing attention to the prescribed forms of marriage with regard to the great body of the people, and might be rendered sufficient to secure general attention to these forms. By these acts of general councils, although clandestine marriages were not declared absolutely null, their validity depended upon the powers, which may be termed discretionary, assumed by the clergy. It forms no part of the present subject of inquiry,—whether these powers were assumed, or exercised with a view to increase the influence of their own order, or to promote the benefit of the community.

The forms and ceremonies of contracting marriage, and the prohibitions against clandestine marriage, continued without alteration till the 24th session of the celebrated Council of Trent. That session was held in 1563, when the Reformation had made considerable progress. It was then expressly statuted,\* that all marriages contracted, unless with previous proclamation of banns, and in the prescribed manner, should be null and void.

The declarations contained in the twelve canons, which immediately precede the decree of the Council of Trent on the reformation of mar-

\* De Reformatione Matrimonii, cap. I.

Chap. III. riage, sufficiently mark the extent of the assumed popish power even in its decline. Four of these canons will be found in the Appendix. In these the vengeance of the Church is denounced against those that shall deny marriage to be a sacrament, or who shall assert that the Church may err in establishing those impediments which render marriage void, or that matrimonial causes do not fall under the cognisance of ecclesiastical judges. Their censures might be followed by excommunication; and, by an early rule of the Church, it was declared that any one who held intercourse with an excommunicated person should himself be deprived of Church privileges.

The Council of Trent was the last of the Popish general-councils, enacting statutory regulations, of which the import has now been briefly stated. Their effects and influence upon the law of Scotland shall now be taken into consideration. Lord Kames has stated, that "Marriage required no solemnity before the time of Pope Innocent III.\* The bridegroom went to the house where the bride lived, and led her home to his own house; by which simple form they became husband and wife. But a ceremony so slight, giving occasion to many questions about marriage, both with regard to the parties, and their issue, marriage in the Church before the priest was established as an essential solemnity."

\* Elucidations, Art. 5.—Form of completing marriage by the law of Scotland.

This description is not applicable to the 13th Chap. III. century of the Christian æra. Lord Kames does not seem to have been aware of the manner in which proclamation of banns and the ceremonies of marriage were introduced into Scotland. Sir David Dalrymple (Lord Hailes) published Historical Memorials concerning the Provincial Councils of the Scottish Clergy, from the earliest accounts to the æra of the Reformation. He annexed the Canons of the Church of Scotland, drawn up in the Provincial Councils, held at Perth, from the year 1242 till 1269. At the commencement of these Provincial Councils, is published a copy of the bull by Pope Honorius III. authorising these councils to be held by the clergy in Scotland, on account of their remote situation. The canons are introduced in the following terms, without specifying their respective dates :—" Incipiunt " *statuta generalia ecclesiæ Scoticanæ.*" A copy of the 65th canon will be found in the Appendix ;\* and from that document it will appear that the proclamation of banns, to be three times made previous to marriage, as provided by the statutes of popish councils, enjoining the regular celebration of marriage, and prohibiting marriage in any other manner, was adopted into the church-discipline of Scotland at that early period.

At that time the regulations thus adopted were adequate for the objects in view. The deliberate

\* Appendix, p. 10.

Chap. III. attention of parties was called to the subject by the solemnity of the proclamation of banns, previous to the intended union ; and any impediments were easily discovered at a time when the intercourse between remote districts, arising from extended commerce, was unknown. At the present period the regular celebration of marriage, after proclamation of banns, deserves the highest commendation, as the only safe and unobjectionable mode of constituting marriage, by adding the solemnities of religion, as necessary for the constitution of the most important of all civil contracts, without subjecting parties to any inconvenience not indispensably required by the interests of society.

The same principle of attention to regularity in the forms of celebrating marriage, and of discouraging clandestine marriage, was acted upon in Scotland, after the regulations contained in the popish general councils, were adopted by the Scottish Provincial Councils. In the Directory for Worship, published in 1644, the proclamation of banns is strictly enjoined ; and the order for the celebration of marriage thus concludes : “ A register is to be carefully kept, wherein the names  
“ of the parties so married, with the time of their  
“ marriage, are forthwith to be fairly recorded in  
“ a book provided for that purpose, for the per-  
“ usal of all whom it may concern.”

By Acts of the General Assembly, VI. and VII. in the year 1690, and XV. in the year 1715, the

regulations for the purpose of preventing the celebration of marriage, without due proclamation of banns, are enforced. Chap. III.

The statute in 1551, fixing the punishment for bigamy to be the same with that for perjury, assumes the celebration of marriage as necessary to its constitution, and inflicts the punishment for the offence as being "contrair the aith and promise maid at the solmnization and contracting of the matrimonie."

Having thus traced to its origin the regular celebration of marriage in Scotland, proceeding upon proclamation of banns, the next subject of inquiry is the period of life at which it may be contracted.

In every other contract or engagement the conduct of minors is viewed with scrupulous jealousy and distrust, and they are by common law, as well as by special statute in Scotland, anxiously protected from the effects of facility, or of levity of conduct incident to minority.

It can scarcely be disputed, that males at the age of fourteen, and females at the age of twelve, have not attained that maturity of reason sufficient to enable them to judge of the propriety of an irrevocable contract, involving consequences of the greatest magnitude. In reasoning by analogy from the rules applicable to other contracts, it should not be lawful to enter into such engagement at an earlier period of life than that which the law has fixed upon in all other important transactions. An

Chap. III. obvious distinction, however, takes place between this and all other contracts. In other cases restitution is practicable, or the rights of both parties may be replaced by recompense, equivalent to restitution ; but in the case of an unsuitable marriage, if voidable after consummation, restitution, or an equivalent, is impossible, and one of the parties must suffer beyond measure.

By the decree of the Council of Trent, the consent of parents or guardians was required previous to the proclamation of banns, in case of minority. This regulation was adopted in France by the *Ordonnance de Blois*, and has since been continued by the *Code Civil*. It has likewise been adopted in England by the Marriage Act in 1753. Nullity of marriage on these grounds, however, has not produced benefit without practical inconveniences. Guardians may reside in different parts of the country, and it may, in many cases, be difficult to ascertain their united opinion. Frauds may be committed by persons whose appearance indicates the age of twenty-one ; and marriages may afterwards be declared invalid, upon the ground of minority, without the necessary consent. As a remedy for such occurrences, it is provided by the *Code Civil* of France, that proclamation of banns shall be made at the place of residence of parents or guardians, as well as at the residence of the parties ; and that an action for the purpose of declaring the nullity of marriage, should not be competent, at the instance of

parents or of guardians, whose consent had not Chap. III.  
been obtained, after the lapse of twelve months  
from the date of the marriage, nor at the instance  
of a party, after the lapse of twelve months from  
the period when marriage is valid, without such  
consent. The remedy is obviously insufficient for  
the prevention of grievous hardships; and it is  
difficult to suggest a remedy which is not open to  
serious objection. It may, therefore, be doubted  
whether the injuries, which may arise from any  
attempted remedy, may not counterbalance the  
evils arising from the apparent inconsistency of  
allowing persons to contract marriage, by regular  
celebration, at an earlier period of life than they  
are allowed to contract other important engage-  
ments which admit of restitution. The attention  
of parents or guardians will, it may be presum-  
ed, be, in general, sufficient to remove the hazard  
of improper matrimonial connexion, if the validity  
of marriage by minors shall be sanctioned by law,  
only when regularly celebrated, after proclamation  
of banns.

Although, however, the mode of constituting  
regular marriage, in Scotland, is salutary and un-  
objectionable, the evidence of its constitution is  
extremely defective, and many inconveniences and  
grievous hardships arise from this cause, for which  
a remedy is required.

The only step connected with the marriage cere-  
mony, in which there is an approximation to the  
benefit of a record, is the proclamation of banns.

Chap. III. It is, however, difficult to trace evidence from records, in the various parishes in which the parties may have resided, not formed into one general register, and the evidence which such records afford is imperfect, even if regularly kept, and easily accessible. Such a record can only afford evidence of an intention to marry, but not of the actual celebration of marriage. Either party may resile after proclamation of banns. The evidence of marriage remains with the clergyman who celebrates it, and in the memory of the witnesses who were present; and occasionally, perhaps, it is given in the form of a certificate, by the officiating clergyman, which the parties rarely preserve. In the course of a few years, all direct evidence of marriage is lost; and, in most cases, the only means of proving it is by habit and repute, or by deeds of succession, or services of heirs. In the latter case, legitimacy is presumed, not proved, and the difficulties which frequently occur in establishing the marriage of an ancestor, after an interval of time, have been frequently felt.

This may be illustrated by a brief statement of the case of *Lindsay and others v. Kerr and others*, decided in the House of Lords, 6th April, 1824.—George Brown Kerr was served heir of provision to his grandfather, and seised in certain lands. A reduction of the service and of his titles was afterwards brought, upon the ground of the illegitimacy of his mother, through whom the right of succession flowed. There was no direct evidence of

his grandfather's marriage, and some witnesses Chap. III. swore that his mother had always been reputed illegitimate, while others deponed, that she had been habit and repute a lawful child. The question discussed was, whether the burden of proving legitimacy lay upon the one party, or the burden of proving bastardy lay upon the other. It was decided, that although the service as heir was not conclusive, it was *prima facie* evidence; and that filiation being admitted, legitimacy was to be presumed, unless the contrary was proved. Such discussions, however, may in many cases be the subject of tedious and expensive proofs.

In Scotland, the benefit of public records has been long known and generally acknowledged. By records, judiciously arranged, and easily accessible to the public at a moderate expense, complete security has been afforded in all important transactions relative to land. The benefit to the public would be unquestionable, by extending the sanction of the records to cases of marriage; upon the principles which have been so well delineated by the Deputy-Clerk Register, in his Annual Reports to the Commissioners on the Public Records, from whose labours in that department, most extensive benefit has been already derived. The establishment of local registers of marriage, under proper regulations, to be transmitted to the General Register at Edinburgh, at specified periods, open to public inspection, upon payment of a moderate fee, would be a measure of a very high

**Chap. III. public utility.** By a statutory enactment, declaring, that an authority by the parties for recording the marriage, should form an essential part of the marriage ceremony ; and that an extract from the register should form the only competent admissible evidence of the marriage, the numerous and painful instances of domestic distress, arising from the frequent discussion of disputed questions, with regard to the validity of marriage and the legitimacy of families, might be entirely avoided. Precautions, similar to those adopted by the popish councils for the general promulgation of the law, would secure attention to it. In addition to the nullity of unrecorded marriages, after a due promulgation of the law, it might be proper to suspend from their clerical functions, all clergymen who neglect to record any marriage celebrated by them ; and other penalties, or legal disabilities, might likewise be established, in order to secure the complete fulfilment of the purposes of the act.

By means of a register, to be made essential for the validity of marriage, all the members of the community would be protected from the hazard arising from latent connexions, and the many painful discussions flowing from them. Such a register, if connected with a regular register of baptisms, would afford easy means of proof, necessary in the services of heirs, and the means of tracing, with certainty, the rights of inheritance.

All the benefits which Mr. Humphreys\* anticipates Chap. III. in his observations on the actual state of the English law of real property, from the establishment of a record of pedigrees or descents, with their proofs in England, would thus be completely attained in Scotland.

An additional important benefit would arise from the establishment of such a register. It may be assumed, that in any given period of time, the number of births will correspond with the number of marriages. The offspring of illicit intercourse, who attain an age when they become useful members of society, bears so small a proportion to the population of the country, as not to deserve computation. A sure criterion would thus be formed for estimating, with great accuracy, the gradual progress of population.

The utility of such a measure has not escaped the attention of the Deputy-Clerk Register. In mentioning the local registers, with regard to births, marriages, and deaths, in his fourth annual report,† he says :—" These local registers are " nearly coeval with the present ecclesiastical establishments of the country, and of their great " utility and importance, there is and can be but " one opinion, either in reference to private individuals, whose rights and interests are often dependent on the evidence they afford, or on pub-

\* Humphreys on Real Property. 2d edit. p. 360.

† Fourth Annual Report, by Deputy-Clerk Register, p. 46.

Chap. III. "lic grounds, as illustrative of the progressive  
"population and political state of the kingdom.  
"It is, however, I believe, a matter of great and  
"general regret, that the regular formation and  
"safe custody of these small local records have  
"been hitherto so little attended to and so im-  
"perfectly provided for. They are committed to  
"the immediate care and superintendence of the  
"kirk-session of each parish, consisting of the  
"minister and certain lay-elders; and the session-  
"clerk, who is usually the parochial schoolmas-  
"ter, is the proper officer to whom, not only the  
"formation, but also the custody of this record is  
"committed."

He adds—"It must be manifest that the pre-  
"sent system of custody is altogether unsafe and  
"improper; and, without going further into the  
"source of the original imperfections of such re-  
"gisters, under the present system, it might be  
"sufficient to mention, that they exclude nearly  
"the whole of those who are religious dissenters  
"from the Established Church of Scotland.

"To remedy these known evils, it seems un-  
"deniable that some new regulations and checks  
"must be resorted to; and it seems at sametime  
"of considerable importance that some new ar-  
"rangements should be devised, by which these  
"small local registers might be made more effeo-  
"tually subservient to those more public and per-  
"manent uses of which they are capable."

The Deputy-Clerk Register afterwards says :—

“ Upon fuller consideration, I am satisfied that, Chap. III.  
 “ in order to establish an efficient control over  
 “ those scattered registers, and at the same time  
 “ to derive from them the greatest utility to the  
 “ public, and to individuals, the whole ought to be  
 “ connected together into one system ; of which  
 “ the most proper centre would be His Majesty’s  
 “ General Register House.”

In another of his valuable reports\* the Deputy-Clerk Register states, the Act of the Secret Council of Scotland, dated 10th December, 1616, for establishing parochial registers of deaths, marriages, and baptisms, as an authentic register. Means for enforcing it were not, however, prescribed. But the Deputy-Clerk Register states, that, if it had been effectually carried into execution, it would have given to the people in this country a record of this description truly invaluable. A copy of the Act is annexed to the Tenth Annual Report, by the Deputy-Clerk Register ; and the preamble of it deserves attention. It is in these words : “ Forsameikle as it is understand  
 “ to the King’s Majestie, and lordis of his secrett  
 “ counsall, That divers questionis dooth oftymes  
 “ arryse in the judicatories of this kingdome anent  
 “ the tymes of marriageis, baptisms, and decease  
 “ of parsonis, quhilks questionis breidis grite consternatioun, and pley betwixt pairties ; and  
 “ drawis thame to idle and unnecessar chargais

\* Tenth Annual Report, anno 1816.

Chap. III. “ and expensis : whereas, if thair war ane famous  
“ and authentick registor, establishit and keipit  
“ in every parosche, bearing the trow and preceis  
“ tyme of the saidis marriageis, baptismes, and de-  
“ cease of personis, the occasioun of suche unne-  
“ cessar contestation and pley wald be removed  
“ and tane away.”

It may be stated, as a fact illustrative of the spirit which then prevailed in Scotland, that the Act of Council, of which the preamble has now been quoted, was made in the year immediately preceding that in which the record of sasines, of such incalculable benefit to Scotland, was effectually established, having been originally instituted in 1600,—abrogated by the Convention of Estates in 1609, and re-established in 1617.

The benefits to be derived from the establishment of an authentic record, affording the only competent proof of marriage, may be illustrated by a case which has been published, since the date of the above report, by the Deputy-Clerk Register, and which is not the only case of the same description which has occurred. It has not entered into the reports of the collected decisions of the Court, as it was not finally decided. The pleadings of counsel, and the opinion of the judges have, however, been given to the public in 1825, by Mr. Robert Bell, advocate, without mentioning the names of the parties. He thus states the case :  
“ That a young lady, an heiress, was, while several years under the age of twenty-one, prevail-

“ ed on by a gentleman, then also under age, to Chap. III.  
“ consent to a marriage, which, though the forms  
“ required by the church were complied with,  
“ was private, in so far as it was concealed from  
“ the knowledge of her relations—that she return-  
“ ed to her mother’s house immediately after the  
“ ceremony was performed—that her husband,  
“ who very soon thereafter, (or, according to the  
“ defender’s statement, next day,) left the king-  
“ dom, never appeared or claimed her as his wife,  
“ and that the marriage never was communicated  
“ to any of her relations till after her death: That  
“ a few years afterwards the lady entered into a  
“ second marriage with a gentleman who was en-  
“ tirely ignorant of the first: That they im-  
“ mediately went home to her mother’s house,  
“ where they resided (with the exception of a few  
“ months, during which they lived at the hus-  
“ band’s seat in the country) till the following  
“ year, when she was delivered of a son; and  
“ that she died within a few days thereafter.”

The question at issue was, whether the son of the second marriage was legitimate and entitled to the succession of his mother’s estate, notwithstanding the existence of the person with whom there had been a marriage previously celebrated. This case was under the consideration of the Court in the year 1811, and it distinctly shows one of the evils arising from the want of an authentic record, even in cases of regular marriage. The father of the child, whose legitimacy was disputed,

Chap. III. never suspected, and had no means of ascertaining the previous engagement of the person to whom he paid his addresses. All that could bear upon the subject, whether derived from the sources of Civil, Canon, English, or Scotch law, was ably brought under the consideration of the Court, in most elaborate and learned debates. The result, however, was that, out of six judges, three were of opinion, that the *bona fides* of the second husband, arising from his ignorance of any prior marriage, was sufficient to establish the legitimacy of his son, while an equal number of judges were of opinion, that the second marriage, being null and void, the offspring must be illegitimate, notwithstanding the *bona fides* of the father. Additional papers were ordered. The parties, however, compromised matters by dividing the estate, leaving the legitimacy of the son undecided.

This case will be more particularly brought into view, in considering the inexpediency of sanctioning the validity of clandestine marriages. At present it is merely stated in illustration of the propriety of establishing a record, as the only admissible evidence of marriage, even when regularly celebrated.

It was stated from the bench, in delivering the opinions of the Court in this case, that it was not calculated to excite much public interest, as it was one of such rare occurrence as might not again happen for centuries. It will, however, appear in the sequel, that cases have occurred in the

short period which has since elapsed, attended with circumstances not less perplexing, in fixing upon the grounds for judicial determination, and not less important and painful in the consequences involved in the discussion. Chap. III.

It appears from the above statement, supported by the authorities referred to, that the purpose of instituting the proclamation of banns, as necessary for the celebration of marriage, was not only to ascertain the existence of any lawful impediments to the proposed union, but to prevent clandestine or improper marriages. Such connexions were strictly prohibited; and at that period a prohibition, which might be enforced with the uncontrolled and rigorous power of the church, was nearly equivalent in its effects to a declaration, that such marriages should be null and void. The most plausible reason which can be assigned for not declaring such marriages absolutely null, is to be found in the increased power which it conferred upon the church, allowed by the canon law, to give sanction and validity to such marriages, upon proof of what might be deemed, in the judicatories of the church, sufficient evidence of the mutual consent of parties to the matrimonial union. The practice of vice could not be reconciled with the precepts of the Gospel; and the clergy had the power of checking and repressing it in the laity, by means of public penance and the terrors of excommunication.

When the power of the church was diminished,

Chap. III. by the influence of the Reformation, even in countries in which the popish religion continued to prevail, it was deemed necessary by the Council of Trent, to declare the nullity of marriage, unless celebrated in the prescribed form, after proclamation of banns.

The duty of the clergy was not confined to the mere act of publishing the banns. They were enjoined, under the hazard of incurring the censure of the church, not only to inquire into, and judge of any impediments to the proposed marriage, which might be stated to them, but to act upon their own knowledge or information with regard to such impediments. Accordingly, after the Reformation was acknowledged in Scotland by statute, Craig, one of the ministers of the Established Church in Edinburgh, refused to proclaim the banns of marriage between Queen Mary and the Earl of Bothwell, when requested, by a writing under the hand of his sovereign, delivered to him by the Lord Justice Clerk, until required to do so by authority which he could not refuse to obey. This fact is briefly alluded to by Robertson.\* It is fully stated by Cook, in his History of the Reformation in Scotland; † and the curious document, presented to the General Assembly by Craig, containing a statement of the facts connected with his conduct, is contained in the Appendix ‡ to that history. While he proclaimed

\* History of Scotland, vol. II. b. IV. p. 218.

† Vol. III. p. 255.

‡ Appendix, No. 16.

the banns by the orders of the supreme authority Chap. III. of the state, he appeals, for his vindication, to his statements of the impediments to the marriage before the Privy Council of Scotland, and in the face of his congregation.

The powerful influence of the church, at the time when marriage was forbidden by Pope Innocent III., unless with previous proclamation of banns, and when clandestine marriage was strictly prohibited, may be judged of from the statement of Gibbon.\* He says, "Under that young and ambitious priest, the successors of St. Peter attained the full meridian of their greatness: and, in a reign of eighteen years, he exercised a despotic command over emperors and kings, whom he raised and deposed; over the nations, whom an interdict of months or years deprived, for the offences of their rulers, of the exercise of Christian worship. In the Council of the Lateran, he acted as the ecclesiastical, and almost as the temporal, sovereign of the east and west. It was at the feet of his legate that John of England surrendered his crown." In order to defray the expenses of the Holy War, he imposed a general tax, called the Saladin Tenth, which Gibbon† states as the foundation of tithes, for the establishment of the clergy, in all Christian countries.

From the above statement, it appears, that, pre-

\* Vol. XI. chap. 59. p. 152.

† Vol. XI. chap. 59. p. 151.

Chap. III. vious to the Reformation, clandestine marriage was so strictly prohibited by the controlling power of the church, that the evil consequences arising from it were greatly mitigated, if not altogether prevented. When the influence of the church was diminished by the Reformation, the nullity of clandestine marriage was declared by the Council of Trent. The authority of that Council was not, however, recognised in Scotland; but the wisdom of that provision has been acknowledged both in France and England, by adopting it into the laws of these countries. In France, the nullity of marriage, without previous proclamation, was declared, by the *Ordonnance de Blois*, article 40,\* in the reign of Henry III., and enforced by an edict of Henry IV. in 1606; by a declaration of Louis XIII. in 1639; and by an edict in 1697, confirming the previous regulations. Even in the case of marriage, although celebrated by a priest, if not duly authorised, such marriage was null. Pothier† thus states the fact:—"La peine des parties qui ont fait célébrer leur mariage par un prêtre incompétent, est la nullité de leur mariage. Quoique le Concile de Trente, qui a prononcé cette peine, comme nous l'avons vu *suprà*, n. 348, n'ait pas été reçu en France, nos Rois ont adopté et confirmé sa disposition à cet égard."

In England, the nullity of all marriages, not ce-

\* *Œuvres de Pothier*, tom. III. p. 292.

† *Pothier*, tom III. p. 295.

celebrated in terms of the statute, in 1753, was de- Chap. III.  
 clared, in order to check the progress of vice, and  
 to prevent the mischievous consequences which  
 followed, from allowing marriage to be consti-  
 tuted by evidence of the conduct of the parties.  
 Unless by special licence, the marriage must take  
 place in church, after proclamation of banns. In  
 the debate, in the House of Commons, during the  
 progress of the bill, it was proposed, that after the  
 death of the parents, living together as husband  
 and wife, and generally reputed as such, it should  
 not be competent to call in question the legitimacy  
 of the children. But this proposal was rejected.

After long experience in France, the nullity of  
 marriage, not duly celebrated, was declared, by  
 the *Code Napoleon*, and has been continued in  
 the *Code Civil*, as the subsisting law of France.  
 It is there declared, \* “ Tout mariage qui n’a  
 “ point été contracté publiquement, et qui n’a  
 “ point été célébré devant l’officier public com-  
 “ petent, peut être attaqué par les époux eux-  
 “ memes, par les père et mère, par les ascendans,  
 “ et par tous ceux qui y ont un intérêt né et ac-  
 “ tuel ainsi que par le ministère public.”

In the *Code Civil*, an improvement has been  
 introduced into the law of France, by the esta-  
 blishment of registers, upon the insertion in which  
 the validity of marriage depends. It is provided, †

\* Code Civil, livre I. titre v. § 191.

† Sect. 194.

Chap. III. " Nul ne peut réclamer le titre d'époux et les  
" effets civils du mariage, s'il ne représente un  
" acte de célébration inscrit sur le registre de  
" l'état civil, sauf les cas prévus par l'article 46,  
" au titre des actes de l'état civil."\*. The excep-  
tion referred to regards the possible occurrence  
of the non-existence of the local registry, or that  
it is lost; in which cases, proof of marriage is al-  
lowed by documentary and parole testimony.

In Scotland, the system of registration has been  
brought to a state of perfection, which would ren-  
der the adoption of any other precautionary mea-  
sures, such as have been adopted in England, su-  
perfluous and unnecessary, for the purpose of  
affording complete protection from the mischiefs  
arising from latent connections; and this benefit  
may be attained, without any sacrifice upon the  
part of individuals, which is not due to the society  
of which they are members.

\* Code Civil, livre VI. titre ii. § 46.

## CHAPTER IV.

ON MARRIAGE, CONSTITUTED OR PROVED BY CONSENT  
*DE PRÆSENTI*.

It may be stated, as a generally received prin- Chap. IV.  
ciple in the law of Scotland, that marriage may be constituted by consent *de præsenti*, deliberately expressed by persons capable of giving such consent. It has not, however, been expressly decided in any case, that such consent, if unaccompanied by sexual intercourse, either previous or subsequent, is sufficient to constitute marriage.

It is an admitted point, that marriage may be constituted by a promise of marriage at a future period, followed by sexual intercourse. These two modes of constituting, or rather of proving marriage, are so intimately connected, and are generally so blended together, as to enter into consideration in most cases which occur for the decision of courts. It is, however, necessary to discriminate between them, and, for the sake of perspicuity, to consider them separately. Although the principle of law must be acknowledged to be considered as settled, that marriage may be constituted in either of these modes, the application of that principle to the cases which have hitherto occurred, and probably to all cases which

Chap. IV. are likely to occur, is so extremely difficult and doubtful, and must be received with such qualifications, as to defeat and render nugatory all the practical benefits which society derives from an apparently fixed and permanent law.

The object of the present inquiry, is not to exhibit a detailed statement of the various cases which have occurred, but to exhibit the results arising from the state of the law, traced in its gradual progress, and illustrated by the consequences which have followed from it.

A most convenient and easy mode of stating these results, is afforded by an examination of the reported case of *Dalrymple versus Dalrymple*, decided by Sir William Scott (Lord Stowell), in the Consistorial Court at London, in July 1811. In that case, although the judgment took place in England, it was assumed that the validity of the marriage must be determined by reference to the law of Scotland, which was to be established as matter of fact. Accordingly, a selection was made of those gentlemen, who, from their professional attainments and reputation, were deemed most competent to state, as matter of fact, what they considered and believed to be the law of Scotland applicable to the points at issue. They were examined upon oath, and their depositions became matter of fact upon record. The judgment of an English court cannot form a precedent, regulating subsequent decisions in Scotland. It is, however, entitled to great weight, from the ta-

lent of the judge who pronounced it. The evidence upon which it proceeded, shows distinctly the points upon which difference of opinion prevailed among Scotch lawyers. Chap. IV.

In that case, it was alleged, that marriage was constituted both by acknowledgments *de præsenti*, and by promise, accompanied with sexual intercourse; and that a subsequent marriage, regularly celebrated in England, was therefore completely invalid. That case shall at present be considered only in so far as regards the constitution of marriage by acknowledgments *de præsenti*.

It is impossible to peruse the above case with attention, without drawing the conclusion, that proof of the constitution of marriage, by words of declaration or acknowledgment *de præsenti*, although apparently precise, is, in its practical application, most vague and indefinite. From the ambiguity of language in general use, and from the various situations of the parties upon such occasions, it is extremely difficult to ascertain, with complete precision, whether the expressions made use of are understood by *both* parties as an acknowledgment *de præsenti*, or by *either* or *both* of them, only as a promise *de futuro*. This difficulty is increased, in cases, in which the evidence of mutual consent depends upon an examination of witnesses, after an interval of time; and it is still further increased by the unquestionable competency of proving expressions of qualification or limitation, following the most explicit acknowledgments or

Chap. IV. declarations which can be uttered. Thus, even in the case of a written contract of marriage, declaring, as is usual, in the most express terms, that the parties accept each other as husband and wife, the subsequent provision, by which they bind themselves to solemnise the marriage in the face of the church, is held to be sufficient to convert the express declaration, *de præsenti*, into a promise *de futuro*, and the acknowledgment in a formal deed, regularly subscribed in presence of mutual friends, is not sufficient for the purpose of establishing a marriage, but merely to lay the foundation for an action of damages for breach of contract.

Even in cases where marriage has been regularly celebrated, if not followed by consummation, instances have occurred in which effect has not been given to the solemn declaration of consent. Thus, in the case of *Cameron against Malcom*,\* the ceremony of marriage was performed, and it was not alleged that any force was used sufficient to render it ineffectual. The bride had just attained the age of twelve; and Lord Kames thus states the principle upon which the Court decided:—  
 “ A girl of twelve years of age is, no doubt, capable of marriage; but then, as a girl of that age  
 “ is extremely susceptible of undue influence, and  
 “ to be unjustly trepanned, a marriage, in this  
 “ circumstance, requires more accurate evidence

\* *Cameron v. Malcom*, 29th June, 1756. Mer. 12,681.

“ of consent than is necessary betwixt adult per- Chap. IV.  
 “ sons. The present case is similar to that of a  
 “ testament on death-bed. A bare subscription  
 “ *in liege poustie* is sufficient ; but, *in extremis*,  
 “ a proof is required of orders given by the tes-  
 “ tator to write the testament, or, at least, that it  
 “ was read over to him before subscription. In  
 “ the present case the parties went to Cousmen’s  
 “ house without any design of marriage ; *2do*,  
 “ The mother not present at the celebration ; *3to*,  
 “ A squabble the moment the ceremony was over,  
 “ and some evidence of repentance on both sides ;  
 “ *4to*, Proved upon Old Cameron, that he en-  
 “ deavoured to bribe one Mally Hay to swear to  
 “ an antecedent courtship, which presumes he  
 “ was conscious of some defect in the celebration  
 “ of the marriage. These circumstances laid to-  
 “ gether, may justly infer a suspicion that matters  
 “ were not carried on so as to make an effectual  
 “ marriage ; and, therefore, in a case of this ex-  
 “ traordinary kind, the Court, I think, took the  
 “ safest side, to refuse to give their sanction to  
 “ this marriage.”

Another case occurred in 1773, in circumstances nearly similar. Allan was a schoolmaster in Edinburgh. Miss Young was the natural daughter of a person who gave her a provision of £2500, and she attended Allan’s school for her education. Her mother, with whom she lived, was afterwards married. It appeared in evidence, that she had written letters to Allan, promising to marry him

Chap. IV. as soon as she should attain the age of twelve.

The marriage, accordingly, was celebrated by one of the clergymen of Edinburgh, after proclamation of banns, within a few days after she attained that age. She informed the clergyman, who performed the ceremony, that she was fifteen years of age. He called her attention to the important consequences resulting from the step which she was about to take; and she expressed her consent in a more decided manner than is usually done upon such occasions. He gave it in evidence that if he had been aware of the amount of her fortune, and that she was just twelve years of age, he would have declined to perform the ceremony. Her mother was not present at the marriage; but, surprised at the absence of her daughter, she went to Allan's house to inquire for her, and then joined the witnesses who had been present, and supped with them in Allan's house. She did not then express her displeasure upon the occasion, but prevailed upon her daughter to return to her house with her after supper. Next day the guardian of Miss Young, named by her father, removed her from Edinburgh. Allan raised a declarator of marriage before the Commissaries, who sustained the defence for Miss Young and her guardian, founded upon the undue influence which the pursuer had attained over the mind of his scholar. Her mother accounted for her apparent acquiescence, by stating her fears that Allan might have had recourse to violent measures, and prevented her daughter from leav-

ing his house, if she had expressed her determination to defeat his object. It likewise appeared in evidence, that Allan had attempted to bribe witnesses. A bill of advocacy against the judgment of the Commissaries was refused. The case has not appeared in any of the reported collections of decisions ; but is to be found in the Commissary Court Records, in the year 1773, as an extracted decree. Chap. IV.

In these cases it was decided, that declarations of mutual consent, in the most explicit terms, strengthened by the actual celebration of marriage, without consummation, might be controlled by facts and circumstances. The Honourable Henry Erskine, who held the situation of His Majesty's Advocate for Scotland, and Dean of the Faculty of Advocates, examined, as a witness, in the case of Dalrymple, gives evidence in the following terms :—" As marriage, *in facie ecclesie*, by the law of Scotland, is neither a sacrament nor a necessary ceremony to constitute the matrimonial union ; that cases might occur where a marriage by a clergyman might be insufficient, from its being proved that, anterior to the celebration, the parties had interchanged written declarations, that the ceremony was to be effected for a totally different purpose, and should not be binding upon either of them. But the respondent conceives that, to take off the effect of a written consent *de præsenti*, or a promise of marriage, followed by a *Copula*, will require the most clear and decisive facts applicable to

Chap. IV. "both the parties, sufficient to show that the  
 "written declaration or promise was given for a  
 "purpose different from that of contracting marriage, and a proof of those facts by the most un-  
 "exceptionable evidence."\*

This statement will show the difficulty attending the practical application of the principle of law, that marriage may be constituted by mutual declarations of consent *per se*. In the case of Dalrymple, the acknowledgments or promises of marriage, were in writing; and although, from the situation in life of the parties, greater accuracy of expression might be expected than in many cases which occur, difference of opinion prevailed among the learned witnesses who were examined, as to the construction which these writings should receive.

Upon another most important point, a material difference of opinion prevailed among the learned witnesses, who were examined in the case of Dalrymple. Some of the witnesses gave their testimony, that marriage may be constituted by clear and unambiguous mutual acknowledgments or declarations *de præsenti per se*. Other witnesses gave equally decided testimony that proof of sexual intercourse, in addition to such acknowledgments, was necessary in order to constitute marriage, unless celebrated by a clergyman after proclamation of banns. Three of the witnesses, who maintained the latter opinion, are now upon the bench of the

\* Haggard's Reports, vol. ii. Appendix, p. 26.

Supreme Court. Another witness, Sir Ilay Camp- Chap. IV.  
bell, many years president of that Court, after  
stating that an irregular marriage may be con-  
stituted, or rather, it may be said proved, in vari-  
ous ways : Depones, that it may be proved “ by  
“ formal acknowledgments, *per verba de præsenti*,  
“ either in writing or declared before witnesses,  
“ though not in presence of a clergyman ; but  
“ these must appear to have been made with a  
“ deliberate intention of living together as hus-  
“ band and wife, and must be attended with per-  
“ sonal intercourse, if not subsequent, at least prior,  
“ otherwise they will resolve into a mere *stipulatio*  
“ *sponsalitia*, similar to what is in every contract  
“ of marriage in the Scots form, which proceeds  
“ on a recital that the parties have accepted of  
“ each other as husband and wife, but which may  
“ be resiled from *rebus integris*. The Court of  
“ Session was of this opinion in the case of Mac-  
“ lauchlane *against* Dobson, 6th December, 1796,  
“ which the deponent apprehends was rightly de-  
“ cided. Had there been either an antecedent or  
“ a subsequent *copula*, by which matters were not  
“ entire, it is probable that the Court would have  
“ decided otherwise ; though this is not clear, as  
“ there were circumstances tending to show that  
“ the parties did not truly mean to live together ;  
“ and both of them admitted that there never was  
“ cohabitation of any kind between them.”\*

The difference of opinion which prevailed among

\* Haggard's Reports, vol. ii. Appendix, p. 140.

Chap. IV. the learned witnesses, cannot be so well stated as in the words of Lord Stowell, in delivering his opinion upon this branch of the case:—" Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide, I am bound. Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I am acquainted, no otherwise than by the degree of eminence, which situation and office, and public practice and reputation, may have conferred upon them. In such a case I am under the necessity of quitting the legal rule *pondere, non numero*; I am compelled to attend a little to the numerical majority, (though I admit this to be a sort of *rusticum judicium*,) and finding that much the greater number of persons recognise a rule consonant to that which, in ancient times, governed the subject universally; I think I am not qualified to say, that, as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe.\*

It appears from the above statement, that Lord Stowell formed his opinion, and gave his judgment, upon what appeared to him to be the preponderance of the conflicting testimony of the learned witnesses upon the important point, whether

\* Haggard's Reports, vol. ii. p. 86.

evidence of expression of mutual consent by de- Chap. IV.  
 clarations of marriage, *de præsenti*, is sufficient for  
 the constitution of it, although unaccompanied by  
 proof of sexual intercourse. In the cases of Craw-  
 ford's Trustees *against* Hart's Relict, 20th January,  
 1802, and Edmonstone *against* Cochrane, 15th  
 May, 1804, founded upon as recognising or esta-  
 blishing the principle, that declarations of consent  
*de præsenti*, were sufficient, *per se*, according to  
 the opinion of the Court, it must be kept in view,  
 that in both these cases, there had been *concubitus*  
 between the parties. The case of M'Adam was  
 decided in the Court of Session in 1807, and was  
 under the view of the witnesses when under ex-  
 amination. The judgment of the Court of Ses-  
 sion was affirmed in the House of Lords in 1813,  
 posterior to the examination of these witnesses,  
 and to the judgment of Lord Stowell, in the case  
 of Dalrymple. Since that time, the opinion has  
 been pretty generally entertained, that the point  
 was settled by this decision; but a careful exami-  
 nation of the circumstances of that case, and of  
 the principle established by the judgment of the  
 House of Lords, will show, that the point is still  
 open for discussion, and is at least not free from  
 doubt. In the case of M'Adam, there was evi-  
 dence of a deliberate intention to complete a  
 marriage at a future period, for the purpose of  
 legitimating children, expressed in the most un-  
 qualified manner, and the intercourse between  
 the parties was afterwards continued without  
 interruption. The declaration which he made,

Chap. IV. was not followed by personal intercourse, as he committed suicide almost immediately after making it. But from the terms of the declaration, it may rather be considered as an acknowledgment of a previously subsisting marriage, than a declaration of consent *de præsenti*. The words he made use of, were, "I take you three to witness, that this is my lawful married wife, and the children by her, are my lawful children." The case was decided upon its own special circumstances, and the general point remains open for discussion, as not free from doubt, whether expressions of mutual consent are sufficient, *per se*, to constitute marriage. The distinction arising from the effects of previous intercourse, is stated by Sir Ilay Campbell, in the evidence above quoted, who expressly states, "that the deliberate intention of living together as husband and wife, must be attended, with personal intercourse, if not subsequent, at least prior to the acknowledgments."

The discussion which took place in the House of Lords, in the case of M'Adam, still further illustrates the difference of opinion which prevailed on this point.\* It was stated, that in the case of M'Lachlane and Dobson, Lord Justice Clerk Macqueen, the greatest Scotch lawyer of his age, had given his opinion, that either party may resile after verbal consent *de præsenti, rebus integris*. It was stated, on the other hand, that in another case, (Ritchie and Wallace, in 1792), the same learned Judge had delivered his opinion,†

\* Dows Reports, vol. i. p. 171.

† Ibid. p. 175.

that actual declaration and acceptance, were *per* Chap. IV. *se* sufficient to constitute marriage.

The House of Lords, in pronouncing judgment in the case of M'Adam, expressed it in terms, which, on purpose, qualified it as a precedent. The third finding was, "that by the declaration of marriage, and the facts and circumstances connected with this declaration, it appeared that the parties did, on the 22d of March 1805, intend forthwith to marry, and did actually contract very matrimony."\*

Lord Chancellor Eldon, in expressing his opinion, that "the contract *de præsenti* formed very marriage *ipsum matrimonium*." Added, "If such was the law of marriage in Scotland, he was relieved from entering upon the consideration of the question, Whether it was wise that that it should have been the law so long? or, Whether it ought to be so in future? If it should be thought proper to make any alteration in the law on this subject, it must be done in another way." His Lordship proposed, "that the judgment should be prefaced with some finding which might distinguish it from some loose cases noticed at the Bar."† The part of that finding applicable to the present subject, has been quoted.

In considering the expediency of the law, this point, therefore, deserves consideration in two views. In the *first* place, It must be considered

\* Dow's Reports, vol. i. p 187.

† Ibid. p. 182.

Chap. IV. as a most important point relative to the constitution of marriage, which remains in some degree doubtful and unsettled; and, *secondly*, If it shall be held to be settled, that marriage may be so constituted by evidence of verbal expressions, without consummation and the concurrence of those concomitant circumstances which fix it indelibly upon the minds of parties, the doctrine is fraught with the most dangerous consequences. The law fixes upon capability of procreation as the criterion for determining the age when marriage may be contracted. When such intercourse does not follow declarations of mutual consent, however explicit in point of form and appearance, a most powerful presumption arises, that the actual constitution of marriage at the time, was not intended and understood by *both* parties.

In every other important transaction, the rights of individuals are protected by the forms which are required to render their contracts complete and effectual, and there is *locus pœnitentiæ*, or an opportunity of resiling *rebus integris*. In the conveyance of land, even of the smallest value, the most deliberate expression of intention is ineffectual, unless completed according to certain legal forms. In all other mutual contracts, parties may resile *rebus integris*, till the contract is concluded in all its parts. But, in the case of the matrimonial contract, which carries along with it important rights, affecting land, as well as the personal property of the parties, and which is intended to promote and secure their happiness

during life, and the prospects of future generations, a contract may be at once concluded by verbal declarations, and proofs of these latent acknowledgments, alleged to have been previously made, although not acted upon for years, and open to various qualifications, may be brought forward after the evidence of an opposite tendency has been lost. The peace of domestic life, and the station in society of others, in ignorance of such imperfect engagements, are thus exposed to the hazard of being for ever destroyed; and innocence receives no protection from the consequences of latent engagements, against the effects of which, human prudence cannot guard.

The dangers arising from such a state of the law, are obvious. The uncertainty of its application, to particular cases, may be still further illustrated by various parts of the evidence in the case of Dalrymple, given by those witnesses who supported the opinion, that marriage may be constituted by words, *de præsenti per se*. Thus, Mr. Craigie, now Lord Craigie, and a Judge of the Supreme Court, after stating the different modes in which marriage may be constituted, depones in the following terms: \* “ But although all these  
 “ are legal modes of constituting marriage by the  
 “ law of Scotland, the one first mentioned, (by  
 “ actual celebration in *facie ecclesiae*), is the only  
 “ one which can be deemed altogether unexceptionable, and not admitting of any proof or ar-

\* Haggard's Reports, vol. ii. App. p. 32.

Chap. IV. “gument to the contrary ; all the others, though  
 “affording *prima facie* evidence of a marriage, ad-  
 “mit of explanation from collateral circumstances.  
 “It is held to be competent to prove, that the acts  
 “were not meant by the parties, to constitute a  
 “marriage, nay, it has been determined, that the  
 “the effect of them may be wrought off by the  
 “after-conduct of parties, at least so far as third  
 “parties are interested.” When afterwards ex-  
 “amined upon interrogatories, the same witness  
 “answereth and saith,\* “That the law of Scotland,  
 “in regard to the validity of marriages, not regu-  
 “larly celebrated, cannot well be said, in general,  
 “to be doubtful and indefinite. But the applica-  
 “tion of the law to existing cases, has, from the  
 “circumstances already mentioned by the respon-  
 “dent, become oftentimes very doubtful and uncer-  
 “tain.”

The same witness thus answers another interro-  
 gatory,† “To the tenth of the said interrogatories,  
 “this respondent answereth and saith, that al-  
 “though, in the case last above stated, the law in  
 “general stands as he has said, such mutual de-  
 “clarations may be counteracted by other writings  
 “of a contrary tendency, or by acts and deeds of  
 “the parties affording real evidence to the con-  
 “trary ; and in all those cases, the declarations of  
 “the parties must be taken with all the attendant  
 “circumstances ; and if there is reason to con-

\* Haggard's Reports, vol. ii. App. p. 34.

† Ibid. p. 36.

“clude from the expressions used by them, that Chap. IV.  
 “*both* or *either* of the parties did not understand  
 “that they were truly man and wife, or that the  
 “declarations were intended for a particular pur-  
 “pose, and not with the view of constituting the  
 “irrevocable union of marriage, all this will en-  
 “ter into the question, whether the parties are  
 “married, or only under an obligation to marry?  
 “But it is almost impossible to say, *a priori*, in  
 “what manner, and to what extent, in all cir-  
 “cumstances, these qualifications or limitations  
 “are to operate.”

In like manner, Sir Hay Campbell depones,  
 that “Questions often arise concerning the vali-  
 “dity of irregular marriage, and the decision of  
 “these must depend, in a great measure, on the  
 “circumstances of each particular case.”\*

The chapter on clandestine marriage will still  
 further illustrate the uncertainty attending the ap-  
 plication of this branch of law, as stated in evi-  
 dence by the learned witnesses examined in the  
 case of Dalrymple, and will contain general ob-  
 servations applicable to the three modes of prov-  
 ing what are termed irregular marriages. In this  
 chapter, which is confined to the mode of consti-  
 tuting marriage by consent *de præsenti*, only one  
 other circumstance connected with it shall be  
 mentioned. It has been stated, in the chapter on  
 regular marriage, that doubts may be entertained

\* Haggard's Reports, vol. ii. App. p. 139.

Chap. IV. with regard to the propriety of sanctioning marriage by minors, without consent of parents or guardians, even when the marriage is celebrated with all the formalities required by the church. But surely there can be no room for doubt, as to the hazard of allowing marriage to be constituted or proved, by the acknowledgments or declarations which may have passed between a boy of fourteen and a girl of twelve years of age. In the intermediate period between these ages, till the termination of minority, a court may perhaps require stronger evidence, than in the case of persons of more mature age; but the law knows no such distinction, and the exercise of any such power, must be discretionary, and, therefore, of an uncertain nature. Lord Stowell, in pronouncing judgment in the case of Dalrymple, in terms affording an excellent specimen of judicial eloquence, says: "The law, which in both countries  
" allows the minor to marry, attributes to him,  
" in a way which cannot be legally averred  
" against, upon the mere ground of youth and  
" inexperience, a competent discretion to dispose  
" of himself in marriage; he has arrived at the  
" years of discretion, *quoad hoc*, whatever he may  
" be with respect to other transactions of life, and  
" he cannot be heard to plead the indiscretion of  
" minority." He afterwards adds: "According  
" to the judgment of all the learned gentlemen

\* Haggard's Reports, vol. ii. p. 60.

“ who have been examined, the law of Scotland Chap. IV.  
 “ binds Mr. Dalrymple, though a minor, a soldier,  
 “ and a foreigner, as effectively as it would do if  
 “ he had been an adult, living in a civil capacity,  
 “ and with an established domicile in that coun-  
 “ try.”

Mr. Erskine has thus stated the principles of the law of Scotland, in so far as regards marriage during minority : “ Neither idiots nor pupils can marry, because both are incapable of consent. The canon law, indeed, affirms, that a pupil may enter into marriage where there is an ability to procreate or conceive ; or, as it is expressed by some doctors, *si malitia suppleat aetatem*. But, *first*, this doctrine supposes an indecent *inspectio corporis*, which is not to be admitted without the most urgent necessity. *secondly*, It is adverse to first principles, for if the law declares a pupil incapable of entering into the most trifling contract, from a defect of judgment, it surely ought not to suffer him to engage in an indissoluble society, the nature of which he cannot form the smallest notion of. Yet if the married pair shall continue to cohabit after *puberty*, such acquiescence makes the marriage valid.”\*

The only essential requisite, as the basis of the matrimonial contract, regarding the age of the parties, is thus made to rest upon the capability of

\* B. i. Tit. 6. sect. 2.

Chap. IV. procreation, and not upon the attainment of that maturity of reason and discretion which the law deems necessary for engaging in every other transaction of importance. In its constitution after *puberty* and during *minority*, the law acknowledges no distinction between regular and clandestine marriages. The forms necessary for the celebration of regular marriage operate strongly as a check against the celebration of it during minority, without the knowledge of parents or guardians. But the law lays no restraint upon the constitution of marriage in a clandestine manner, even during minority; and any restraint laid upon it by courts, in the administration of the law, must be discretionary and precarious.

It is sufficient at present to state these general principles of law applicable to marriage, constituted or proved by consent *de præsenti*. The consequences arising from the practical application of these principles, will be more fully considered in a subsequent chapter upon clandestine marriage, comprehending marriage by promises *de futuro*, *subsequenti copula*.

## CHAPTER V.

ON MARRIAGE CONSTITUTED OR PROVED BY PROMISE  
*SUBSEQUENTE COPULA*.

It is an unquestionable proposition, that a promise of marriage *de futuro*, however explicit, is not sufficient for the constitution of the matrimonial contract. Lord Stair\* says, that “marriage itself consists not in the promise, but in the present consent, whereby they accept each other as husband and wife; whether that be by words expressly, or tacitly, by marital cohabitation or acknowledgment, or by natural commixtion, where there hath been a promise or espousals preceding; for therein is presumed a conjugal consent *de presenti*.”\* Chap. V.

It cannot be disputed, that, in Scotland, at a very early period, a promise followed by subsequent sexual intercourse, created an obligation to solemnise marriage, which might be enforced by competent authority, if no mid impediment intervened. But it was not decided till the case of Pennycook and Grinton *against* Grinton and Graite, 15th December 1752; that such promise and intercourse, not accompanied with cohabita-

\* B. i. tit. 4. sect. 6.

Chap. V. tion as husband and wife, formed a sufficient constitution of marriage to exclude the rights of another party, openly and avowedly, living under that acknowledged connexion. In that case, Pennycook, in the process originally brought by her, only claimed aliment for her child, expenses, and damages. In a subsequent process, however, not commenced till after Grinton had lived with another person in the acknowledged character of husband and wife, although the marriage had not been celebrated in *facie ecclesiæ*, and after the birth of a child, in consequence of this second connexion, Pennycook, in the full knowledge of the second connexion, in which she seemed to have acquiesced, subsequently maintained her previous legal rights as a married person, constituted by a promise *subsequente copula*. Lord Kames maintained, that a promise, *cum copula*, may found an action to oblige the party to complete marriage, but is not an actual marriage, to void a subsequent marriage lawfully contracted. He further maintained, that “to hold a promise of marriage *cum* “*copula*, two acts of the most private nature and “most uncertain proof, to be equal to a marriage “regularly solemnised, is to overturn the whole “system of our law with regard to marriage, and “to render it much more uncertain than even the “*inductio in domum mariti*. The pernicious effects of this opinion reach still farther. For, at “that rate, the most solemn marriage will not “secure a woman, even of the highest rank, nor “her children; a low woman appears, who suc-

“ceeds in proving a promise *cum copula* by wit- Chap. V.  
 “nesses of her own rank, perhaps engaged pri-  
 “vately to partake of the spoil.”\* The Court,  
 however, decided, that a promise of marriage fol-  
 lowed by *copula*, made from that moment an ac-  
 tual marriage. Lord Kames was of opinion, that  
 the case would have been differently decided if  
 the second marriage had been regularly celebrated.  
 From subsequent decisions, and the effect given to  
 the evidence in the case of Dalrymple, it may  
 now, however, be assumed, as a decided point,  
 that a promise of marriage, followed by sexual  
 intercourse, without any open or public acknow-  
 ledgment, and even although purposely conceal-  
 ed and kept private, to suit the views of either of  
 the parties, will be sufficient to annul a subse-  
 quent marriage wherever contracted, although so-  
 lemnised with the regular formalities, and follow-  
 ed by consummation.

The distinction between promises in two situa-  
 tions materially different, has not hitherto been  
 completely ascertained. A female, who is induced  
 to yield to solicitation and unmastered importu-  
 nities, under the conviction of matrimonial con-  
 nexion, arising from her faith in a promise, and  
 her belief in its effects, stands in extremely dif-  
 ferent circumstances from one who has surrender-  
 ed her virtue without any promise, and merely  
 continues the previously commenced intercourse,  
 after receiving a promise of marriage.

\* Kames's Elucidations, Art 5.

Chap. V. In the manner of constituting marriage now under consideration, it is necessary to have recourse to proof, which from its nature must be open to very great uncertainty, and which it is desirable to avoid, both from regard to public decency, and the feelings and interests of private families.

It seems impossible to deny, that female happiness is thus exposed to hazards which cannot take place in England in the case of a virtuous woman. Lord Stowell has said, in one of those eloquently decided cases in the Consistorial Court of London, that in Scotland, "if there are circumstances which require the marriage to be kept secret, the woman, after such declarations past, carries her virgin honours to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case, there are no other ideas excited than such as belong to matrimonial intercourse. It is the 'bed undressed,' according to the notions of that country; it is the actual ceremony, as well as the substance of marriage; it is the conversion of the lover into the husband, *transit in matrimonium*, if it was not *matrimonium* before."\*

\* Haggard's Reports, vol. ii. p. 114.

These observations, however, stand connected chap. V. with the immediately preceding remarks, in which he states, that “ in this part of the island, the “ same circumstances would not induce the probability of a *private surrender*, because a *public ceremony* being here indispensibly required, no “ young woman, acting with a regard to virtue “ and character, and common prudence, would “ surrender her person in a way which would not “ only not constitute a marriage, but would, in “ all probability, defeat all expectation of such an “ event.”

It is impossible to doubt which of the two systems is most consistent with, and conducive to the interests of religion and morality. If the boasted morality of Scotland surpasses that of England, it must proceed from other causes than the influence of the law of marriage, which affords such aid to the insidious arts of the seducer, to attain his object, by delusive hopes and promises, not easily proved ; and which holds out to the artful female such strong temptations to surrender the portion of virtue which she possesses, in order to avail herself of promises, made without due consideration, or in the ardour of excited passion. The licentiousness, which never fails to accompany increasing wealth and refinement of manners, requires to be checked, and certainly ought not to be encouraged by the tendency of the law.

These remarks apply with irresistible force in a country in which marriage may be contracted

Chap. v. during the minority of either or both of the parties, without the consent or knowledge of parents or guardians.

Having, in the preceding and in this chapter, marked the leading distinctions between the legal effect of acknowledgments *de præsenti*, and of promises *de futuro subsequente copula*, separately considered, the evils to which the community is exposed by the difficulties and uncertainty attending the application of the law to various cases in which these two points are generally blended together, will be resumed in the 8th and 9th chapters upon clandestine marriage, and upon the expediency of giving legal sanction to such marriages, as affecting the general interests of the British Empire.

## CHAPTER VI.

ON MARRIAGE CONSTITUTED OR PROVED BY HABIT  
AND REPUTE.

THE only other mode of constituting or proving Chap. VI. marriage, which now remains to be considered, is by cohabitation or living together in the acknowledged character of husband and wife, usually termed in the law of Scotland, by habit and repute. The presumption of marriage arising from such cohabitation, was established in the law of Scotland, by special statute, in 1503. The statute states the reason of the enactment to have proceeded from the obstacles which widows encountered in establishing their right to the terce of the lands in which their husbands died infest; and it therefore enacts, that “ quhair the matrimonie “ was not accused in their lifetimes, and that the “ woman askand this teirce, being repute and “ halden as his lauchful wife in his lifetime, sall “ be teirced, and bruik her teirce, but ony impediments or exceptions to be proponed against “ her, ay and while it be clearly decerned, and “ sentence given, that scho was not his lauchfull

Chap. VI. " wife, and that scho suld not have ane lauchful  
" teirce therefore."\*

The statute does not enact that marriage shall be constituted by habit and repute, but it establishes a presumption applicable to the case of widows pursuing for their terce, that the matrimonial union had been contracted by parties living together in the acknowledged character of husband and wife, unless upon proof of an opposite tendency. The presumption established by statute has been extended by usage, so as to apply to all cases of disputed marriage; but this presumption may be opposed at any time by proof of an opposite nature.

Until a record shall be established, which renders it imperative to preserve evidence of every marriage, for the purpose of giving validity to its constitution, recourse must be generally had to this mode of establishing marriage when disputed at any distant period of time, in discussions with regard to the legitimacy of the issue of the connexion. The object of the statute was obtained by protecting the rights of widows. Until a proper record shall be established, the rights of the issue of the marriage do not stand completely protected. Even in cases in which property in land has devolved upon the descendants of a marriage, the question of legitimacy is still open for discus-

\* Stat. James IV. c. 77, Anno 1503.

sion. In all services of heirs, legitimacy, if not Chap. VI. disputed, is presumed, and not proved ; and unless the proof of the celebration of marriage remain, which very rarely happens, its validity is open for discussion. In questions with regard to land, possession for a prescriptive period, may, in many cases, prevent the necessity of such discussion. But claims may arise, by descent, from a person in whom the right of succession had never been vested by any legal title, and against whom the plea of prescription would not apply. The claim to titles of rank and peerage, must frequently be traced through remote ancestors, and the alleged illegitimacy of any one of these, destroys the whole chain of evidence upon which the claim depends.

The establishment of a record upon such principles as have been suggested in the Annual Reports by the Deputy-Clerk Register, would enable future generations to trace distinctly and easily, all those claims to which they may be entitled in right of their ancestors, whether male or female. Rights of succession may flow through female ancestors who have been married to persons possessed of landed property ; but if such rights were not vested by legal titles in the person of the married female ancestor, it may, in many cases, be difficult, if at all possible, to trace any right through her, as the descendants of her husband complete their titles to his estates in the character

Chap. VI. of nearest and lawful heirs, without mentioning the name of the female ancestor, through whom a claim may arise after several generations have passed away.

## CHAPTER VII.

## ON LEGITIMATION BY SUBSEQUENT MARRIAGE.

It has not been ascertained with certainty, at Chap. VII. what period legitimation by subsequent marriage has been introduced into the law of Scotland. The most ancient law of the country does not recognise the doctrine. It is stated in the *Regiam Majestatem*,\* that any objection to a claim to heritage, upon the ground that the claimant is not born in lawful marriage, shall not be decided in the King's Court, but shall be remitted to the Bishop, and the form of procedure is specially pointed out. The question as to legitimation by subsequent marriage, is specially stated, and the answer given in the following terms, as translated from the original by Sir John Skene:† “ Anent  
 “ the lawfulness of children, ane question may be  
 “ proponed, Gif ane Barne is gotten, and borne  
 “ betwix ane man and ane woman, before lawful  
 “ marriage betwix them compleit; gif that Barne  
 “ is lawfull or not, it being of veritie, that the  
 “ Father of the Barne thereafter marries, and  
 “ takes to his lawfull wife the mother of the samin  
 “ barne.”

\* Lib. ii. c. 50.

† Cap. 51.

Chap. VII.    “ 2. Albeit the barne gotten and borne, as said is,  
 “ be the common civill law of the Romans, and  
 “ be the canon and pontificall law, is lawfull,  
 “ nevertheless conform to the law of this Realme,  
 “ he may naewaies be suffered or heard to claim  
 “ any heretage as lawful heir.”

“ And gif question sall be, quhither he was got-  
 “ ten before or after the marriage, compleit be-  
 “ twix his father and his mother, that sall be de-  
 “ cided before the judge ecclesiastical as said is.

“ And what he decerns in that matter, he sall  
 “ certifie the king and his justiciar thereanent.

“ And conforme to the dome and decreit given  
 “ in his court be hem in the kings court, the heri-  
 “ tage sall be decerned to pertain to him. Swa  
 “ that in the kings court, he sall either tyne or  
 “ wone the heritage, quhilk is in controversie and  
 “ clamed be him.”

Sir John Skene published the *Regiam Majesta-tem* in 1609, in its original language, and a translation of it. After mentioning the question to be decided, the law of Scotland is stated in the following terms :

“ 2. Et quidem licet secundum Canones et leges  
 “ Romanas tales filius sit hæres legitimus.

“ 3. Tametsi secundum jus et consuetudinem  
 “ Regni nullo modo hæreditatem tanquam hæres  
 “ sustinere potest nec hæreditatem petere.” Upon  
 the margin, Sir John Skene adds, in his translation : “ Be the practick the contrare is observed.”

The alteration in the law is thus ascertained to have taken place previous to 1609.

The authority of the Treatise of the *Regiam* Chap. VII. *Majestatem* has been disputed, on account of doubts as to its authenticity. Upon this point, however, the law, as therein stated, corresponds with the feudal institutions which prevailed both in England and in Scotland; and in the former country, legitimacy by subsequent marriage has not at any period been recognised.

The origin of legitimation by subsequent marriage may be traced to the Roman Law, and the period of its introduction in the Canon Law to the Pontificate of Alexander III. By the civil law, concubinage was recognised and sanctioned. The issue of that connexion were entitled to demand fulfilment of the stipulations made in their favour, but were denied the full legal rights of inheritance as heirs of their father. They were denominated natural children, (*Liberi naturales*) and the offspring of prostitution were termed (*Spurii*) spurious. It was lawful by subsequent marriage to confer upon natural children the benefits of legitimacy, but this privilege was not extended to the issue of intercourse deemed illicit. “Per subsequens matrimonium legitimantur liberi naturales quorum Parentes concubinatum in nuptias commutant.”

“Facile patet non pertinere legitimationem ad spurios vel vulgo quæritos, nec ex adulterio, vel incestu procreatos quorum inter Parentes fingi non potest matrimonium.”\* Hence arose the

\* Heinec. Inst. Lib. I. Tit. 10. De legitimatione.

Chap. VII. distinction between *Legitimi* and *Legitimati*. The former were entitled to all the rights of inheritance by birth, as the offspring of marriage; the latter were legitimated by the subsequent contract of marriage being allowed to take place, instead of the previously avowed and legally recognised contract of concubinage.

In the year 1179, Pope Alexander III. under the title “*Qui filii sunt legitimi*,”\* declares, “*Tanta est enim vis sacramenti (matrimonij) ut qui antea sunt geniti, post contractum matrimonium habeantur legitimi.*” The Canon Law thus extended to the offspring of prostitution, that benefit which by the Civil Law was confined to the offspring of concubinage, being a connexion leading to a contract recognised by law, and conferring certain rights.

The most memorable instance in which legitimation by subsequent marriage has been acknowledged in Scotland, while it establishes the fact, carries along with it proofs of the hazard and uncertainty with which the doctrine is attended.

Robert II. of Scotland, the first sovereign of the Stuart race, had a family by Elizabeth Mure, daughter of Sir Adam Mure of Rowallan. He afterwards, in 1347, obtained a dispensation from Pope Clement VI. in which it is stated that the marriage could not take place without an apostolical dispensation, as the parties stood in the

\* Appendix to third General Lateran Council. *Sacro Sancta Concilia*. Tom. X. pars. xxxiii. c. 1.

fourth degree of consanguinity, which, at that Chap. VII. time, was within the forbidden degrees. It is therein expressly stated, that there had been previous cohabitation, and a numerous offspring; and the dispensation, therefore, not only acknowledges the legitimacy of children who may afterwards be born, but declares the legitimacy of those who were then in existence. John, Earl of Carrick, who afterwards reigned under the name of Robert III., and who was the father of James I. of Scotland, was the oldest son of the marriage between Robert II. and Elizabeth Mure. No cause has been assigned by historians for the assumption of the name of Robert, by John Earl of Carrick. But, if doubts as to his legal rights were entertained, it may be conjectured, that he might look to the effect and influence of the name of his celebrated ancestor, Robert Bruce, which he assumed.

Robert II. was afterwards married to Euphemia Ross, daughter of the Earl of Ross, and widow of the Earl of Moray; and a dispensation was obtained, during the same pontificate, in the year 1355, for this second marriage, stated to be necessary on the ground of consanguinity, and proper in order to prevent family feuds. But, as no children between these parties were in existence previous to this dispensation, it only declares, that the children who may thereafter be born shall be legitimate.

Complete proof of the legitimacy of the stock

CHAP. VII. of the reigning family thus depended upon the evidence afforded by those papal dispensations.

Notwithstanding the exalted rank of one of the parties, and the high station of the others, it was not till the year 1789 that the question with regard to the legitimacy of Robert III. was completely set at rest. Mr. Andrew Stewart, with great difficulty, and after most laborious research, was able to trace these two papal dispensations, and to obtain official copies from the Secret Records kept at the Vatican, which he has published in his Supplement to the Genealogical History of the Stewarts.

For a period of about four centuries, the legitimacy of the stock of the royal family of Scotland was a subject of doubt, and of frequent and keen discussions. It is instructive to trace the uncertainty of evidence, when not preserved by properly established records. Fordun states the fact, as to the marriage with Elizabeth Mure, correctly, in the following terms :—"Iste Robertus copulavit sibi de facto unam de Filiabus Adæ Moræ militis, de qua genuit filios et filias, extra matrimonium, quam, postea impetrata dispensatione sedis Apostolicæ et obtenta desponsavit canonice et forma ecclesiæ. anno Domini 1349."\*

Bower, in continuation of Fordun, states, that Euphemia Ross was the first wife of Robert II.

\* De nuptiis Roberti Senescalli Scotiæ atque Elizabethæ Moræ dissertatio. Fordun, Scotichronicon. Edini. Edit.

and that, upon her death, he married Elizabeth Chap. VII. Mure; and Boethias repeats the mistake. According to Buchanan, Robert II. had an illegitimate family by Elizabeth Mure, previous to his marriage with Euphemia Ross. If this statement had been correct, an irremediable impediment to the legitimacy of his children by Elizabeth Mure, by subsequent marriage, took place by his marriage with Euphemia Ross.

Buchanan's History was published in 1582. Sir John Skene, Clerk Register, in his Chronological Table of the Kings of Scotland, published in 1597, along with the Acts of Parliament, states the marriage of Robert II. with Euphemia Ross, as prior to that with Elizabeth Mure. Sir Thomas Murray of Glendoick, Clerk Register, obtained the royal authority, in 1681, for publishing the Acts of the Scotch Parliament, and also the Chronology of the whole Kings of Scotland, and the same Chronological Tables which Sir John Skene had published, were again published in 1686, with additions, during the intermediate period. These statements were thus given by official persons, and involve the conclusion that the sovereigns of Scotland, of the Stuart race, were kings *de facto*, but not *de jure*, as derived from an illegitimate stock.

It was not till the reign of Charles I. that this mistake was stated by any person, and it gave rise to discussions which, as already mentioned, were not finally settled till 1789. It is unnecessary to state the various publications to which the discus-

Chap. VII. sions gave rise, or the evidence adduced from the Record of Charters, by which the legitimacy of the royal family was attempted to be supported. The nature of the discussion will be sufficiently understood from the title of one of these statements, published in 1695, by George Viscount of Tarbat, (afterwards Earl of Cromarty,) Clerk to His Majesty's Councils, Registers, and Rolls, intitled, "A Vindication of Robert III., King of Scotland, from the Imputation of Bastardy, by the clear proof of Elizabeth Mure, daughter to Sir Adam Mure of Rowallan, her being the first lawful wife of Robert II. then Stewart of Scotland, and Earl of Stratherne."

These doubts produced fatal consequences. It is a well-known historical fact, that James I. of Scotland, son of Robert III., was murdered at Perth, by the conspiracy of his nobles, and that the principal conspirator was the Earl of Atholl. It is expressly stated by Drummond of Hawthornden, whose history of the Five Jameses of Scotland was published after his death, about the year 1656, that the ground of quarrel of the Earl of Atholl was founded upon his right to the throne, as the descendant of Robert II., by his supposed first wife Euphemia Ross. In reprobating this act of murder and treason, Drummond does not state it as treason against a king *de jure* ;\* and distinctly

\* History of the Lives and Reigns of the Five Jameses, Kings of Scotland, p. 14.

states his own, and the popular belief, that the legal right of the family by Euphemia Ross, was preferable to that of the family by Elizabeth Mure. He says, "The conspirators were Robert Graham, uncle and tutor to Miles Graham, Robert Stewart, nephew to Walter, Earl of Atholl, and one of the king's sworn domestics. But he who gave motion to all was the Earl of Atholl himself, the king's father's brother, whose quarrel was no less than a pretended title and claim to the crown, which he formed and alleged thus :—His brother David and he were procreated by King Robert II. on his first wife Euphemia Ross, daughter to the Earl of Ross, and therefore ought and should have been preferred to the succession of the crown before King John, (named Robert) and all the race of Elizabeth Mure, who was but his second wife, and next them, but heirs to King Robert II." And he adds : "That the Earl of Atholl considered not how sacred the name of king is to the Scotch nation ; how a crown, once worn, taketh away what defects soever ; and that it was not easy to divest a king, in present possession, of a crown, who had his right from his father and grandfather, with the authority of a Parliament approving his descent, and secluding all others ; less came it in his thought that those children are legitimate and lawful, which cannot be thrust back and rejected, without troubling the common peace of the country, and opening a

Chap. VII. "gate to foreign invasions, domestical disturbances,  
 "and all disorders, with an unsettled course of  
 "succession ; the common error making the right  
 "or law."

It had been stated,\* as matter of conjecture, that Elizabeth Mure was not the concubine of Robert II. but that there had been a private marriage, contrary to the decrees of the canon law, which could only be rendered valid by a dispensation from the Pope. It is, however, certain that Robert III. was born before the date of the dispensation. If another conjecture be allowable, it may be stated, as matter of probability, that this was the first instance in Scotland of legitimacy established by subsequent marriage. This conjecture is rendered more probable from the doubts which seem to have been entertained upon the subject, which led to an act of Parliament, passed at Scoon on 27th March, 1371, which "confirms  
 "Robert's own right to the crown, acknowledges  
 "John Earl of Carrick, Stewart of Scotland, to  
 "be his eldest son, and true and lawful heir to  
 "the crown. Accordingly, the prelates, earls,  
 "states, &c. in Parliament assembled, with hands  
 "uplifted towards heaven, in the most solemn  
 "manner, severally and unanimously swore that,  
 "if the said John Earl of Carrick, do survive his  
 "father, King Robert, that he shall succeed him,  
 "as his first-born son, true and lawful son and

\* Introduction to the History of the Five Jameses, p. 43.

“ heir ; and further declare for themselves and Chap. VII.  
 “ successors, that the said John should be their  
 “ king, and that they would assist and defend him  
 “ against all men whatsoever.”

Maitland, in his *History of Scotland*,\* states, that, for the purpose of distinguishing this memorable act in a more eminent manner, fifty-two seals of the chief men of the kingdom are fixed to it, which, together with the instrument, are still to be seen in the National Archives, in the Lower Parliament-House, at Edinburgh.

Such procedure, during the life of a reigning sovereign, can only be accounted for from the doubts which were entertained with regard to the right of succession to the throne. In order still further to secure popular favour, John Earl of Carrick assumed the name of his celebrated ancestor, Robert Bruce.

The conjecture that it was at that period that legitimization by subsequent marriage was introduced into Scotland, and that great doubts prevailed upon the subject, is corroborated by the unquestionable historical fact, that the attempt had been made to introduce the doctrine into England during the reign of Henry III. in the year 1235, which completely failed, as is established by the statute at Merton, concluding with these frequently quoted words,—“ *Nolumus leges Angliæ mutare.*”

\* Maitland's *History of Scotland*, vol. I. p. 556.

Chap. VII. From the above statement the uncertainty of evidence requisite for deciding questions of legitimacy, established by subsequent marriage, is manifest, and the benefits to be derived from an easily accessible record are obvious. The difficulties which occurred in settling the important discussion which has now been stated, arose, in a great measure, from the irregular manner in which the records are kept at the Vatican, and from these records being almost inaccessible to the public. The benefit of a record cannot be complete and certain, unless it shall be made imperative upon the parties to record their marriage. A record becomes unavailing, if a marriage duly recorded in it at the time of celebration, can be rendered invalid by any previous latent connexion which may be subsequently established or proved; or, if it shall remain a subject for discussion, to which of the families the *status* of legitimacy should be awarded.

The injury to society arising from this branch of the law is so obvious as to require little illustration. Parents acquire habits which are neither sanctioned by religion nor morality. The offspring are, in general, not well qualified by their education and early modes of life, to fill the higher station in society of one of the parents, or to follow the industrious habits which are more peculiarly necessary for their support in an inferior station. An illicit connexion, once established, naturally leads to continued endeavours to place one of the

parties in a situation which precludes him from Chap. VII.  
forming a matrimonial connexion suitable to his station and prospects in life, by the uncertainty of the effects of the unguarded expressions which he may have been induced to use during an illicit intercourse, bearing, in point of form, the appearance of deliberate matrimonial consent. Towards the close of life, an acknowledgment is thus obtained, sufficient to give legal effect to a connexion, which one of the parties has, during the best period of his life, been ashamed to avow.

It is in vain to argue upon the absurd presumption, or fiction, as it is more properly denominated, in favour of morality and of marriage, that the matrimonial union formed the original, though unacknowledged basis of the connexion. If such principles of morality shall be generally acted upon by the lower ranks of mankind, who are less under the control of those feelings which restrain the higher classes from any violation of decency, and which render vice less dangerous in its consequences,—the benefits derived from viewing marriage as a religious institution, and from considering the vow of mutual fidelity, as a sacred obligation, will cease, and the peace and good order of society will be disturbed. The example is of dangerous tendency.

It cannot, however, be denied, that the doctrine of legitimation by subsequent marriage, is now completely recognised in the law of Scotland. The immoral tendency of the law may, however, be illustrated by an unanimous judgment of the

Chap. VII. Court in a recent case.\* Mr. Ross, a native of Scotland, in which he had inherited a paternal estate, and succeeded to an entailed estate, destined to heirs-male, resided in London, where he carried on business as an army-agent, and had a family of daughters. After the death of his wife, he formed an illicit connexion with an English woman, by whom he had a son. In about four years thereafter, he resided in Scotland for a short time, and was regularly married to the person with whom he had lived in England in illicit intercourse, apparently for the purpose of legitimating his son. After his death, the next heir of entail brought an action, concluding to have it declared, that the son of Mr. Ross was born a bastard in England, and “still is held and reputed a bastard, and that therefore he is incapable of lawful succession, and has no title to any of the rights competent to lawful children.” The judges of the Consistorial Court were equally divided in opinion as to the legitimation by subsequent marriage; and, according to the rule of that Court, judgment was therefore pronounced in favour of the defender, sustaining his legitimation. This judgment has been affirmed unanimously by the Court of Session, and the *status* of legitimacy, in so far as it can effect legal rights in Scotland, has been conferred, in direct opposition to the law of England, the usual place of residence of the parents, according to which the *status* of legitimacy

\* *Monroe and Ross v. Ross*, May 15, 1827.

could not be acquired by subsequent marriage. Chap. VII. Such a case was hypothetically stated as an argument of inexpediency in the case of putative marriage, reported by Mr. Bell, mentioned in the third, and which will be more fully noticed in the following chapter. It was stated, that an entailed proprietor, having a family of daughters, excluded from the succession by the terms of the entail, or who felt anxious that his succession should not devolve upon a female, had thus a temptation opened to him to form illicit connexions, until he should have a male heir whom he might legitimate by subsequent marriage. The influence of such feelings is exemplified in the case of M<sup>r</sup> Adam. In that case, it appears in evidence, that "the great objection he had always had to marriage was, the fear of having no family, which would have made him the most miserable man alive."\* Acting under this feeling, he made anxious inquiries, at the commencement of his illicit intercourse, with regard to the powers he possessed, to legitimate the offspring of it at a subsequent period.

The legitimation of the children of Robert II. by subsequent marriage, by the authority of Pope Clement VI. did not take place till the year 1347.

Mr. Hume has stated the occurrences which took place when it was attempted to introduce into England the law of legitimation by subse-

\* Dow's Reports, vol I. p. 156.

Chap. VII. quent marriage, which led to the statute at Merton, in 1235 :—" There had been great disputes " between the Civil and Ecclesiastical Courts concerning bastardy. The common law had deemed all those to be bastards who were born before wedlock. By the canon law they were legitimate. And, when any dispute of inheritance arose, it had formerly been usual for the Civil Courts to issue writs to the spiritual, directing them to enquire into the legitimacy of the person. The bishop always returned an answer agreeable to the Canon Law, though contrary to the Municipal Law of the kingdom. For this reason the Civil Courts had changed the terms of their writ ; and, instead of requiring the spiritual courts to make inquisition concerning the legitimacy of the person, they only proposed the simple question of fact, whether he were born before or after wedlock ? The prelates complained of this practice to the Parliament, assembled at Merton, in the twentieth year of this king, and desired that the Municipal Law might be rendered conformable to the canon ; but received from all the nobility the memorable reply, *Nolumus leges Angliæ mutare*.—We will not change the laws of England."\* Blackstone has thus stated the Law of England upon this subject, and assigns the reasons for rejecting the law of legitimation by subsequent mar-

\* History of England, vol. II. p. 222.

riage.\* “ A bastard by our English law, is one Chap. VII.  
 “ that is not only begotten, but born out of law-  
 “ ful matrimony. The Civil and Canon Laws, do  
 “ not allow a child to remain a bastard, if the  
 “ parents afterwards intermarry ; and herein they  
 “ differ most materially from our law, which,  
 “ though not so strict as to require that the child  
 “ shall be begotten, yet makes it an indispensable  
 “ condition, that it shall be born after lawful  
 “ wedlock. And the reason of our English law,  
 “ is surely much superior to that of the Roman,  
 “ if we consider the principal end and design of  
 “ establishing the contract of marriage, taken in  
 “ a civil light, abstractedly from any religious  
 “ view, which has nothing to do with the legiti-  
 “ macy or illegitimacy of the children. The  
 “ main end and design of marriage, therefore, be-  
 “ ing to ascertain and fix upon some certain  
 “ person to whom the care, the protection, the  
 “ maintenance, and the education of the children  
 “ should belong, this end is undoubtedly better  
 “ answered by legitimating all issue born after  
 “ wedlock, than by legitimating all issue of the  
 “ same parties even born before wedlock, so as wed-  
 “ lock afterwards ensues. 1st, Because of the very great  
 “ uncertainty, there will generally be in the proof,  
 “ that the issue was really begotten by the same  
 “ man ; whereas, by confining the proof to the  
 “ birth, and not to the begetting, our law has  
 “ the advantage of being more certain and more  
 “ equal.” Vol. I. p. 454.

Chap. VII. " rendered it perfectly certain what child is legitimate, and who is to take care of the child.  
 " 2d, Because, by the Roman law, a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto* ; thereby opening a door to many frauds and partialities, which, by our law, are prevented. 3d, Because, by those laws, a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents ; whereby the main end of marriage, the protection of infants, is totally frustrated. 4th, Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated ; but a dozen of them may, twenty years after their birth by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state, to which one main inducement is usually not the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our institutions guard against this indecency, and, at the same time, give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent, as not to bastardize the child if it be born, though not begotten in law-

“ful wedlock; for this is an incident that can Chap. VII.  
 “happen but once, since all future children will  
 “be begotten as well as born within the rules of  
 “honour and civil society. Upon reasons like  
 “these, we may suppose the peers to have acted  
 “at the Parliament of Merton, when they refused  
 “to enact, that children born before marriage,  
 “should be esteemed legitimate.”

The above statement, upon authority, entitled to great weight, lays down general principles, which open a field for argument, so obvious, as not to require illustration. It may, however, be observed, that Blackstone does not mark the distinction in the Roman law between the offspring of the recognised connexion of concubinage, who might be legitimated by the subsequent marriage of the parents, and the offspring of illicit intercourse, who were incapable of legitimation. By the Roman law, the offspring of prostitution could not be legitimated by subsequent marriage.

It has been already stated, that the doctrine of legitimation, by subsequent marriage, is now completely established in the law of Scotland. It may, therefore, appear desirable to many, to avoid a total change in the law, and to apply a remedy, by which the mischievous consequences arising from it may be diminished. One of the Judges of the Supreme Court, whose opinions are entitled to great weight and consideration, concluded his opinion, in the case of *Rose versus Ross*, above mentioned, in the following terms: “The

CHAP. VII. "law of legitimation *per subsequens matrimonium*, is certainly part of the law of Scotland, and it is no part of my province to alter it; but, in cases of difficulty, I do not think that an institution, encouraging loose morals, is entitled to any favour leading to a liberal interpretation."

Some of the injurious effects of the doctrine may be removed or limited, by providing, that legitimation, by subsequent marriage, can only be rendered effectual, by inserting in the Record of Marriages, proposed to be established, not merely the date when the subsequent marriage takes place, but the names of all the children who are thereby to be legitimated, and the periods of their respective births.

## CHAPTER VIII.

## ON CLANDESTINE MARRIAGE.

THE various modes of establishing or proving marriage, and the objections applicable to each of these modes, having been separately considered, it now remains to take a general and comprehensive view of the consequences arising from clandestine marriage, constituted or proved in any or all of the modes, separately or combined, which have been already mentioned. This will embrace cases of private or concealed marriage, which, under the external appearance, of regular marriage, may produce consequences, scarcely less injurious to individuals, than those marriages which are strictly denominated clandestine.

It appears, from the statement in the third chapter, that the mode of constituting marriage in the regular manner, by proclamation of banns, and the acknowledgment of parties, in presence of a clergyman, who adds the solemnities of religion to the obligation of a civil contract, is admirably adapted for insuring attention to a subject of such deep importance, and for preserving the good order of society; and that the only de-

Chap. VIII. fect in that part of the system, arises from the want of a proper record, to afford permanent and easily accessible evidence of the fact. It further appears, that at the period when the forms necessary for constituting marriage were established, the prohibitions against clandestine marriage were strong, and might be enforced with powerful effects by the control of the church judicatories; and that at the time of the Reformation, when the power of the church to enforce prohibitions, was diminished, it was deemed expedient to convert those prohibitions into declarations of absolute nullity of marriage irregularly contracted.

The declaration of nullity of clandestine or irregular marriages, pronounced by the Council of Trent, has not, however, been adopted in the law of Scotland. Soon after the restoration of Charles II. a statute (1661, c. 34,) was passed, intituled, "An Act against Clandestine and Unlawful Marriages," upon the preamble that it was necessary that "no marriage be celebrated but according to the laudable order and constitution of this kirk, and by such persons as are, by the authority of this kirk, warranted to celebrate the same." The statute "prohibits and discharges all men and women, having both their ordinary residence within this kingdom, to get marriage to themselves with others within the kingdom of England or Ireland, without proclamation of banns here in Scotland, and against the order and constitution of this church or kingdom,"

under the penalties therein mentioned, according Chap. VIIL to the rank of the parties. It is likewise enacted, that “ whatsoever person or persons shall here-  
“ after marry, or procure themselves to be mar-  
“ ried in a clandestine and in orderly way, or by  
“ Jesuits, priests, or any other not authorised by  
“ this kirk, that they shall be imprisoned for three  
“ months, and besides their said imprisonment,  
“ shall pay” specified penalties, according to their  
rank. The statute, however, does not declare  
such marriages to be null. It is enacted, that  
“ the celebrator of such marriages be banished  
“ the kingdom never to return therein, under the  
“ pain of death.” By subsequent statute, 1698,  
c. 6. it is enacted, that parties clandestinely or ir-  
regularly married, shall, when required, “ declare  
“ the names and designations of the minister or  
“ person who celebrates the said clandestine or  
“ irregular marriages, and of such as were wit-  
“ nesses to the said marriages, with certification,  
“ that if they refuse, when required, the foresaid  
“ parties married shall pay” according to their  
rank, specified penalties higher than those contain-  
ed in the previous statute; and “ the celebrator of  
“ the said clandestine marriage shall be liable to  
“ be summarily seized and imprisoned by any or-  
“ dinar magistrate or justice of peace, and further  
“ punishable by the Lords of his Majesty’s Privy  
“ Council, not only by perpetual banishment, but  
“ by such pecunial or corporal pains, as the said  
“ Lords of Privy Council shall think fit to inflict;  
“ as also, that the witnesses to the said clandestine

Chap. VIII. "marriages shall be liable each of them in the  
"sum of £100 Scots, *toties quoties*, to be applied  
"to the uses, and in manner above mentioned, or  
"if insolvent, to such corporal punishment as the  
"said laws shall think fit to determine."

The declared purpose of the Legislature, was to prevent clandestine or irregular marriages. The measures adopted for accomplishing the objects of the Legislature, are now totally and completely inefficient. The truth of this remark is obvious, by a statement of the law, in the words of an author, whose name deservedly gives weight to it. Mr. Hume, treating on the subject of clandestine marriage, says, "It is true it some time happens, that a couple go into the presence of a magistrate, and there exchange the matrimonial consent; and in this there does not seem to be any thing unlawful on the part of the magistrate, who does not pretend to marry them, or at all to officiate in the matter, but merely serves as a reputable witness of the act and civil contract of the parties. But, if he should so far forget himself, and step out of his civil office, as to pray on the occasion, or pronounce the nuptial benediction, and act as a clergyman would, and especially if he make a common trade of this sort of interposition, and take a fee for his trouble, his quality of magistrate will not hinder this indecent and unwarrantable conduct to be the proper subject of the statutory pains."\*

\* Hume's Commentaries, vol. II. chap. 20. p. 327.

Upon this respectable authority, it may therefore be stated, that the penalties against clandestine marriage, contained in the statute, can only be incurred through the ignorance of the parties; who can completely attain their object by preserving the necessary evidence without incurring the statutory penalties. Chap. VIII.

At the time when these statutes were passed, the principles of law applicable to acknowledgments of marriage *de præsenti*, or promises *de futuro*, seem to have been very imperfectly understood. The practical consequences, arising from the application of these principles, could have received very little attention. Some of these consequences shall be pointed out in the words of the same author, from whose work the last quotation was taken. He says,\* “ The offence of clandestine marriage naturally connects with that of bigamy. It is committed by the non-observance of that laudable and public order in the contracting of marriage, which the law, for obvious and salutary purposes, has enjoined. It is well known, that the custom of Scotland imposes very little restraint on the inclinations of such persons who are desirous of entering into the state of matrimony. They may accomplish their union, not only without any assistance of religion, or the church, but even without the use of any appointed civil forms ; so

\* Hume's Commentaries, vol. II. chap. 20. p. 323.

Chap. VIII. “ the couple themselves, though unauthorised by  
“ the will of parents or guardians, do explicitly,  
“ fully, and deliberately consent. But, although  
“ our law, which, in this, seems to be guided upon  
“ the whole by wise and liberal considerations of  
“ policy, does permit and suffer, yet it by no  
“ means approves or would encourage the con-  
“ tracting of marriage in this private and uncere-  
“ monious fashion, attended, as it is, with the  
“ plain hazard, not only of rash and unsuitable  
“ matches, but of incestuous, adulterous, or other-  
“ wise unlawful alliances. On the contrary, it  
“ bestows on all marriages of this description the  
“ name of clandestine, or disorderly ; and holds  
“ no marriage to be right or inoffensive but that  
“ which is celebrated by a priest, duly authorised  
“ by the church, and after proclamation of banns.”

The hazard attending the allowance of clandestine marriage is, to a certain extent, thus distinctly pointed out ; but the wise and liberal considerations of policy which permit and suffer the continuance of a system, fraught with hazards of such magnitude and extensive application, or the benefits which are to be put in comparison with the mischievous consequences which it is calculated to produce, are not explained.

The validity of marriage may carry along with it effects of a highly penal, as well as of a civil nature.

The offence of adultery is, by statute 1563, cap. 74, criminally punishable, and in the case of notour

adultery; meaning, thereby, that the parties per-  
 sist in their intercourse, it is enacted that they,  
 “ shall be punished with all regour until the death,  
 “ alsweil the woman as the man, doer and com-  
 “ mitter of the samen, after that due monition be  
 “ maid to abstein frae the said manifest and no-  
 “ tour cryme.”

By statute 1581, c. 105, the application of the law was extended; and these acts are ratified by statute, 1701, c. 11, and “ ordered to be put to “ strict and vigorous execution.”

The offence of simple adultery has, in many, though not recent instances, been punished by forfeiture of moveables, scourging, and banishment. The punishment of death has been, in some instances, inflicted, and, in other instances, commuted into less rigorous punishments. The prosecution for this offence may be competently brought, either at the instance of the injured spouse, or of the public prosecutor.\*

The offence of bigamy is punishable with the pains of perjury, by statute 1551, c. 19, as contrary to the oath and promise made at solemnising and contracting marriage; and Mr. Hume observes, “ that it may sometimes depend on the prosecutor’s “ pleasure to libel the same fact as bigamy, or as “ notour adultery (that is, by procreation of chil- “ dren, or open cohabitation of the parties;) under “ which last appellation he may even relevantly in-

\* Hume’s Commentaries, vol. II. chap. xix. p. 312.

Chap. VIII. "sist in a capital conclusion." Mr. Hume adds :—  
 "Upon this footing John Guthrie, alias William  
 "Laird, had sentence of death, March 14, 1617.  
 "And, on the same ground, libel for notour  
 "adultery, was sent to an assize, and a conviction obtained, in the case of John Fraser, writer  
 "in Edinburgh, in November, 1673. Nor can  
 "these proceedings be quarrelled as unlawful ;  
 "since the adultery is certainly not the less such,  
 "nor the less scandalous and manifest, for being  
 "attended with the false assumption of the character of man and wife."\*

The parties in these discussions, leading to such serious consequences, may stand in various situations, which involve very different degrees of culpability. The offence may be committed by the husband or by the wife. In the latter case, the effects are much more dangerous and extensive, by the hazard of a spurious issue. Both parties may be married, or only one of them. Both marriages may have been celebrated *in facie ecclesiæ*, or both may have been clandestine ; or one of the marriages may have been regular and the other clandestine. The connexion which gives rise to the discussion may be a clandestine marriage prior to a regular marriage, or a regular marriage prior to a clandestine marriage. The complete ignorance of the subsisting connexion, as a valid marriage, and the various grounds of

\* Hume's Commentaries, vol. II. chap. xix. p. 392.

doubt and suspicion, in all their different degrees, Chap. VIII. between complete ignorance and certain knowledge, enter deeply into the consideration of such cases. Accordingly, various points of doubt, with regard to criminal prosecutions, have been stated by Mr. Hume. These, however, do not form the object of the present inquiry; but, it is a fact not to be disputed that, in the administration of criminal, or of civil law involving highly penal consequences, it is of the greatest importance that all grounds for doubt and uncertainty should be avoided.

In its civil effects and consequences, doubt and uncertainty in the interpretation of the law, are, in the case of marriage, defects of most extensive application. The difficulties attending judicial decision, as affecting the parties themselves, are exemplified in the case of Dalrymple, and in the decisions of the Court referred to by the learned witnesses who were examined, to give evidence as to the subsisting law of Scotland. Their conflicting testimony shews the uncertainty and doubts prevailing with regard to the law. The hazard with which the application of it is attended may be explained and illustrated, by stating the import of some of the decisions referred to. The case of Pennycook, has now become a precedent.\* John Grinton made proposals of marriage to Alison Pennycook, and obtained her consent. The birth of a son was the

\* Pennycook and Grinton, v. Grinton and Graite, Dec. 15, 1750.

**Chap. VIII** consequence of intercourse between these parties. Pennycook commenced a prosecution before the Commissaries of Edinburgh, concluding for expenses during her confinement, aliment to the child, and damages, but did not at that time assert any rights as his wife. Grinton afterwards married another person. After the birth of a child by this marriage, Pennycook raised a summons in her own and in her son's name against Grinton, for the purpose of having her marriage and the legitimacy of the child declared. The action contained a conclusion of divorce, on account of the defender's open adultery with Ann Graite, whom he had subsequently married. The Commissaries found "The marriage between John Grinton and Alison Pennycook proven, and declared them husband and wife, and James Grinton their lawful child; and found it proved, that John Grinton and Ann Graite had celebrated a marriage in January, 1750, but that the same was unlawful, void and null; and found, that in respect of John Grinton's cohabitation with Ann Graite, he had been guilty of adultery, and therefore they divorced and separated Alison Pennycook from him." The Court affirmed the judgment of the Commissaries.

Lord Kames has remarked, that the banns had not been duly proclaimed in the case of Grinton's second marriage, and has stated his persuasion, that this particular had weight with the judges, though it entered not into the reasoning nor was

expressed in the judgment.\* It appears from the *Chap VIII* report of the case by Lord Elchies, that three of the judges (one of whom was Lord Kames,) “thought that a promise of marriage and *copula*, “did not *per se* make a marriage, but only inferred an obligation to solemnise a marriage.”

In a previous case,† the Court had refused to allow a proof in a declarator of marriage, at the instance of a woman who had concealed her own alleged marriage for a period of twenty years, during which the defender had been married, and had a numerous family by a wife whom the pursuer had acknowledged as such. The House of Lords, however, reversed the judgment, and allowed a proof. The pursuer failed in proving facts and circumstances sufficient to infer the previous marriage, but such proof was held to be competent and relevant. It may now be held to be established, by the principle of decision adopted in these and in later cases, that even the acquiescence in a subsequent marriage, although it may be a circumstance of evidence, will not be sufficient to defeat a latent claim to be established by proof of facts and circumstances sufficient to infer marriage. A virtuous female, who contracts marriage with a person who has carried on an illicit intercourse, during a residence in Scotland, can therefore have no certainty that claims

\* Kames' *Elucidations*, Art. 5.

† *Kennedy v. Campbell*, June 19, 1747. *Elchies*, No. 7. *vide* Proof.

Chap. VIII. against her *status* as a wife, and the legitimacy of her children, may not at some future period be brought forward. From the preponderance of opinion to which Lord Stowell gave effect, in pronouncing judgment in the case of Dalrymple, it does not even appear certain, if it be necessary, that an acknowledgment of marriage *de præsenti*, must be followed by consummation, in order to make effectual a latent claim, which may render invalid a subsequent, suitable, and regular marriage. The question may thus arise without the occurrence of concomitant circumstances, calculated to mark, with absolute certainty, the decided belief and conviction of the parties, that they were intitled to claim the rights, and bound to perform the duties of husband and wife.

A person having views of forming a suitable marriage, cannot relieve himself from the difficulties in which he may stand involved by rash expressions used during the levity of youth, or the indiscretion of an unguarded moment. An application to the person to whom he stands committed, would fix upon him the character which he is anxious to avoid, and even her acquiescence in the validity of a subsequent marriage, may be retracted at a future period.

This statement is corroborated by the evidence of the learned witnesses in the case of Dalrymple. Mr. Hume, Professor of Scots Law, says,\* “ That

\* Haggard's Reports in the Consistory Court of London, vol. II. App. p. 70.

“the deponent sees great difficulty in the way of Chap. VIII.  
 “sustaining the plea of personal objection, as in  
 “bar of the first wife, whose state once duly con-  
 “tracted, is immutable, and cannot even express-  
 “ly be renounced, and much less by any sort of  
 “implication, and this difficulty increases in the  
 “case of there being issue of the first marriage.  
 “That it is true the plea of personal objection was  
 “sustained in the Court of Session in the case of  
 “Campbell of Carrick, 28th July, 1747, where  
 “the first wife had lived for years in the neigh-  
 “bourhood, and in the society of the second, but  
 “that judgment was reversed in the House of  
 “Lords, and the parties were sent to proof upon  
 “the case. That, upon the whole, in the case of  
 “the man contracting a second marriage in Eng-  
 “land, while the first wife continued to reside in  
 “Scotland, and is thus presumed ignorant, or  
 “has had an imperfect knowledge of the man’s ad-  
 “dresses, the deponent sees no sufficient reason,  
 “and knows no authority for sustaining the plea  
 “of personal objection against the woman.”

In like manner, Mr. Cay, for many years one  
 of the Judges of the Supreme Consistorial Court  
 in Scotland, in mentioning the above case of Ken-  
 nedy *versus* Campbell, states, in evidence, the  
 effect of the judgment in the House of Lords to  
 be,\* “that no degree of concealment of a mar-

\* Haggard’s Reports in the Consistory Court of London, Vol. II.  
 App. p. 90.

Chap. VIII. "riage by both parties, and no silence or even acquiescence of the woman in a posterior, public, and open marriage of the man with another woman, could bar her at any after period, even after the death of the alleged husband, from asserting her own individual rights as widow, (there being no issue of her own connexion), even to the effect of annulling a posterior public marriage, and depriving the widow of such public marriage of her *status* and place in society as such."

The same witness gives it in evidence,\* and founds his belief upon decided cases, that a marriage established by proof of facts and circumstances, sufficient to infer it, may be not only insisted in to the effect of annulling a subsequent marriage, notwithstanding apparent acquiescence in it, but that a discharge granted "of all pretensions of marriage that she could claim," is not sufficient to bar the right of action of the person granting such discharge.

Mr. Hamilton, for many years Professor of the Law of Nature and of Nations, examined on interrogatories, depones,† if "a promise has been followed by a *copula*, a marriage is thereby constituted, which no circumstances or length of time can annul; and which the woman, accordingly, may at any subsequent period de-

\* Haggard's Reports, vol. II. App. p. 95.

† Ibid. p. 50.

“mand to be declared in the proper court. If a Chap. VIII.  
“man has made a promise, and is uncertain, from  
“the circumstances which have occurred, whether  
“or not he has involved himself in a marriage,  
“his remedy is by an action of jactitation of marriage, or of ‘putting to silence,’ as we call it in  
“the Consistorial Court, the result of which will  
“decide whether he is bound or free.”

Unless by such a proceeding, which, in most cases, would prevent the fulfilment of a proposed suitable connexion, there can be no security even in regular marriage, against latent and doubtful claims, which may not be brought forward till proof of an opposite tendency has been lost. The process of jactitation, or putting to silence, is one of rare occurrence, for obvious reasons, and the rights of a wife, by regular marriage, and of her offspring, are thus exposed to hazard without due protection. By supporting claims under irregular or vicious connexions, the rights of others under suitable virtuous connexions and regular marriage, are sacrificed. If it had been established by decisions of the Supreme Court, that declarations or promises of marriage, accompanied by such facts and circumstances in the conduct of parties as were sufficient to infer it, are merely the foundation of a right of action to constitute a marriage by competent authority, if no mid impediment, (such as the celebration of a regular marriage with another party) intervened, the discussions would have affected only the rights of the

Chap. VIII. individual parties, from whose irregularity of conduct the doubts or disputes had arisen. But by the law, as now established, effect is given to these latent and concealed prior engagements, to be established by evidence at a future period, in preference to rights arising from subsequent marriage, openly and regularly celebrated. The consequences, therefore, extend beyond the parties themselves who contracted the latent engagements, and involve other parties, entirely innocent, in the misery attending such discussions. The increased intercourse which now takes place from one extremity of the island to the other, leads to matrimonial connexions between parties unacquainted with those circumstances, of which the knowledge is confined to local situation. There is not a family in the United Kingdom whose happiness and peace of mind may not be disturbed, and whose interests may not be most deeply affected, or injured, by the consequences arising from the state of the law of Scotland, upon the subject of clandestine marriage.

Uncertainty of decision upon this point, was unavoidable by the canon law. Instead of having recourse to plain rules, dictated by common sense, for the purpose of ascertaining whether the parties themselves understood, that, by the engagements which had taken place between them, they were for ever after to be considered as husband and wife, nice and subtile distinctions were made,

agreeably to which the canonists might decide CHAP. VIII.  
 upon the validity of the marriage ; and these distinctions were acted upon by the church-judicatories. Accordingly, it was stated, in the case of putative marriage, reported by Mr. Bell, by a learned counsel now upon the Bench, that upon inquiry as to the best authorities upon the canon law, he was referred to one book, in thirty folio volumes, and was informed that there were two other writers, whose works were nearly of the same length, and that two of the three were always at direct variance with each other. This uncertainty may be further illustrated. By one of the Decretals\*, the following rule is adopted :  
 “ Contrahens successive per verba *de præsenti*,  
 “ cum duabus, tenetur adherere primæ. Si autem  
 “ primo contraxit per verba *de futuro*, secundo  
 “ per verba *de præsenti*, adhærebit secundæ.”

The decision of such cases therefore depended upon a canonical criticism with regard to the import of the expressions which had passed between the parties interested.

The fluctuation of decision may likewise be stated upon canonical authority. Pope Alexander III.† in answering a case propounded to him by an archbishop, declared that, if consent *de præsenti* was expressed by such words as these : “ Ego te  
 “ accipio in meam et ego accipio te in meum,”

\* Corpus Juris Canonici, Decretal Gregory IX. lib. iv. tit. iv. cap. i.

† Ibid. lib. iv. tit. iv. cap. iii.

**Chap. VIII.** whether an oath was interposed or not, it was unlawful for the woman to marry another; and, if she should contract a second engagement by promise, even although followed by sexual intercourse, she should be separated from the second and should return to the first husband. The Pope, however, adds, that it had been otherwise decided by some of his predecessors, "*Quamvis aliter a quibusdam predecessoribus nostris sit aliquando judicatum.*"

Papal dispensations set at defiance all established rules. Thus it was declared by the Fourth Lateran Council, cap. 50, that marriage should be for ever prohibited within the fourth degree of consanguinity; and that, by the continuance of intercourse by persons within that degree of kindred, the sin was increased and not diminished. In the face of this unrevoked authority, innumerable dispensations have been granted, sanctioning such marriages, sometimes previous, and at other times subsequent to intercourse between the parties.

Uncertainty of decision, with all the evils arising from it, are unavoidable in the administration of the law of Scotland, as it now stands. Instead of a rule, of easy application, according to which the parties themselves may know whether marriage has been validly contracted or not, clandestine marriage is left open to a proof by facts and circumstances susceptible of a great variety of modifications, and open to all the difficulties

arising from the ambiguity of language and the Chap. VIII.  
inaccuracy of witnesses.

In a previous chapter, the uncertainty of the application of the law of Scotland, in cases of declarations *de præsenti*, was stated, as mentioned by some of the learned witnesses examined in the case of Dalrymple. This uncertainty may now be further illustrated. Mr. Hume, for many years professor of Scots law, depones,\* “ That, with respect to the evidence of the proper matrimonial consent having passed between the parties, the practice of the law of Scotland is not limited by strict or scrupulous rules, but allows the fact to be vouched or inferred in sundry modes of evidence ; by public cohabitation, under the character, or, as it is termed, the habit and repute of man and wife ; by writings of mutual acceptance as spouses *de præsenti* ; by mutual written declarations, or acknowledgments of marriage ; by a series of letters, such as in their contents and modes of address and subscription, either express or virtually imply an acknowledgment of marriage ; by verbal declaration also before a magistrate, or made on some suitable and serious occasion, before creditable witnesses called by the parties for that purpose. That, whether the writings executed by the parties are in the form of mutual and present acceptance of each other as spouses, or in that of a declaration

\* Haggard's Reports, vol. II. appendix, p. 64.

Chap. VIII. "of marriage as already made, is nowise material," &c.

The same learned witness afterwards gives it in evidence :\*—" To the tenth of the said interrogatories, this respondent answereth and saith, that it has already been said in his deposition in chief, that written declarations of marriage, how explicit soever, are liable to be controlled and expounded by the correspondence of parties, or by evidence in the conduct and behaviour of parties, tending to show that it was not their meaning, nor was it so understood or agreed between them that they were actually married. Further, this respondent saith, that such questions are very nice and circumstantial, and require a studied attention to all the expressions used by the parties in their letters, and all the possible meanings of those expressions and the motives of parties to use them."

The uncertainty of the application of the law, is manifested and acknowledged by the unquestionable competency, and the frequent occurrence of claims laid alternatively to obtain damages for seduction, or to establish marriage. The evidence now and previously quoted, points out the difficulties and doubts which must continue to lead to uncertainty in deciding questions relative to the constitution of marriage, when the validity of it is disputed by one of the alleged contracting parties. The

\* Haggard's Reports, vol. II. App. p. 71.

principles of law affecting such questions, even if Chap. VIII. considered as fixed, are open to such qualifications, in their practical application, as to produce all the bad effects which result from uncertainty in the law itself.

Upon the validity of marriage, depend the rights of legitimacy, and the law, as it now seems to be established, opens a wide field for painful discussion upon this most important point.

The case of putative marriage, reported by Mr. Bell, alluded to in the third chapter, distinctly marks the unsettled state of the law upon this important point; and the various views which were so ably exhibited in the discussion of it, show the dangerous consequences attending that uncertainty. The first marriage was celebrated by a clergyman, but was concealed; and it was stated, that it had not been followed by consummation. The second marriage was regular in every respect, and it was endeavoured to establish the legitimacy of the son by the second marriage, after the death of his mother, upon the grounds of the *bona fides* of his father, who was entirely ignorant of any such previous connexion.

By the canon law, the complete *bona fides*, upon the part of one of the parents, was held sufficient to establish the *status* and legitimacy of the offspring. The authority of the canon law in Scotland, therefore, entered deeply into the discussion of the question. On the one hand, it was maintained, that our consistorial law was founded

Chap. VIII. upon, and followed the canon law, which was binding, unless in so far as altered by statute or contrary usage. On the other hand, it was argued, that the canon law was only binding in so far as specially recognised and adopted. It was acknowledged as one of the sources from which our consistorial law is derived, and entitled to consideration in so far as its maxims are just and equitable. Upon this disputed point, one of the Judges thus expressed his opinion:\* “ I cannot go so far on  
“ either side of the question, as has been done by  
“ the parties. I cannot admit with the one, that  
“ it is of itself entitled to the authority of law in  
“ this country, in all cases matrimonial, and in all  
“ questions of legitimacy ; and I cannot say with  
“ the other, that it cannot be held to have ever  
“ been law, unless where it is mentioned in Acts  
“ of Parliament, or express decisions.”

The strong bearing and tendency of the argument of Lord Stowell, (in the case of *Dalrymple*), was to establish the proposition, that the matrimonial law of Scotland was regulated by the canon law, as the ancient general law of Europe, unless in so far as resiled from.

The opinions delivered by the Judges in Scotland in the case of putative marriage, reported by Mr. Bell, afford no certain criterion for ascertaining the degree of weight which is due to the canon law. It may, however, be observed, that the application of the canon law is calcu-

\* Case of Putative Marriage reported by Mr. Bell, p. 176.

lated to lead to very uncertain results. Mr. <sup>Chap. VIII.</sup> Erskine has described this law,\* as "compounded, " on the one hand, of beautiful principles of equity, " chiefly borrowed from the Roman law ; and, on " the other, of a collection of absurd canons and " rescripts, extolling church authority above the " highest secular powers." The canon law is described in the case of putative marriage, above alluded to, by a counsel of great eminence, now upon the Bench, " as professing to take cognisance of the thoughts as well as the actions of " men. Attending more to the motives than to " the nature or consequences of what they did, " the canonists attempted to regulate their system, " by a reference to that system of ultimate retribution which every enlightened legislator has held, " will be far better regulated if it is left entirely to " the wisdom of Providence in the next world, than " by any assistance which human laws may attempt to give it in this." The uncertainty of the canon law in its application to many cases, must be obvious upon considering its origin and progress. An ultimate appeal lay to the Pope. Every Pope arrogated infallibility to himself, but never ascribed that attribute to his predecessors. Every case was, therefore, decided in the plenitude of power, upon the principles of equity or expediency which prevailed at the time, and a fluctuation in the grounds of judgment took

\* B. I. tit. I. sect. 28.

Chap. VIII. place, which evinced no marks of infallibility.

In the case of putative marriage as affecting the legitimacy of issue, to which reference has been made, the Judges of the Court of Session were equally divided in opinion. Three were of opinion, that the validity of the first marriage rendered the second marriage absolutely void and null, and consequently the issue of it illegitimate. The other three Judges were of opinion, agreeably to the canon law, that the *bona fides* of the father was sufficient to confer the *status* of legitimacy, and consequently the right of inheritance upon his son. The parties, instead of complying with the orders of Court to lodge additional papers, and of continuing to play a game of chance, attended with great expense, compromised the dispute by dividing the estate. The point of law, therefore, remains undecided.

In whatever manner such a case may be decided, the inexpediency of allowing marriage to be contracted, and to remain latent, and to become the subject of proof at a future period, in any other manner than by a regular and easily accessible record, is made manifest, by reflecting upon the above case. It was stated, in point of expediency upon the bench, and by those who maintained the validity of the first marriage, that the most mischievous consequences might ensue by refusing to give effect to it. That the same principle must be applied in excluding the validity of

the second marriage, as if there had been a child Chap. VIII. by the previous marriage to claim the estate, and that to deprive the issue of a marriage which, although latent and concealed, the law recognises, would be manifestly unjust. On the other hand, it was held upon the bench, that the *bona fides* of the husband of the second marriage was sufficient to protect the legitimacy of his child; and the question of expediency was thus stated: \* “In considering the question on grounds of expediency, as to what may be the consequences of a judgment, either in favour of the one party or of the other, while I confess that the dangers pointed out by the pursuer seem to me to be more than chimerical, I can see very great danger indeed if we pronounce a contrary judgment. The case must often have occurred, at least in point of argument and plea, if the effect of *bona fides* had not been universally held to be law; and dangerous, indeed, would be the consequences of the law if *bona fides* could not legitimate the children of such a marriage, as it would open a way to the most atrocious frauds.

“Look to the decisions of this Court—look to the numberless cases in which attempts have been made to carry off estates from the lawful heirs—look to the innumerable instances of perjury in cases of death-bed; and, in most cases, perjury, I am afraid, is too common, at

\* Case of Putative Marriage, p. 199.

Chap. VIII. "least great prevarication is, and judge if such  
" questions as this would not have frequently oc-  
" curred, if the succession to persons deceased  
" could have been carried off by such an allegation,  
" as that a previous marriage rendered the chil-  
" dren of the second, illegitimate, notwithstanding  
" the most complete *bona fides* on the part of its  
" parents.

" A man marries a woman of mature age, from  
" whom he expects good and proper conduct ;  
" indeed, a man, when he marries, may be held  
" in some respect to warrant the prudence and  
" conduct of the woman whom he selects for his  
" wife ; and if he marries, from proper motives, a  
" woman come to the years of discretion, he must  
" be dealt with, as if he were willing to do so.  
" But if the *bona fides* of the parents is not to re-  
" ceive effect from the law, a man must do a  
" great deal more : he must warrant the prudence  
" of her childish years—not merely the prudence  
" of that time of life when he marries her, but he  
" must warrant himself from the most loose, the  
" most unmeaning, and the most childish cere-  
" mony, that may have taken place from the time  
" that she was twelve years of age. He may be  
" certain of her virtue, and he may be certain of  
" her prudence, at the time of the marriage ; he  
" may be willing to undertake that risk ; but he  
" cannot be certain of the prudence of any child  
" at the early age of twelve. If the pursuer's ar-  
" gument, therefore, is to be sustained by your

“ lordships, then, I say, that excepting in reliance Chap.VIII.

“ on one’s own *bona fides*, no man can now go  
“ down to the grave in peace, or with any cer-  
“ tainty of the legitimacy of his offspring: for  
“ what is easier, when a man is dead, and cannot  
“ contradict it, than to make such an allegation  
“ as this, that he had been married before. The  
“ second husband in this case happened to have  
“ been married only one year, and to have had  
“ only one child; but if the pursuer’s argument  
“ is good for any thing at all, it would have been  
“ as good, after twenty or forty years cohabitation,  
“ as after one, and after every means of proving  
“ the falsehood of the allegation had been lost.

“ And who could assure himself that he would  
“ ever be able to prove the falsehood of such an  
“ allegation, made at any time. It must often be  
“ a very easy matter to set aside children, with-  
“ out the least reason being afforded for it by the  
“ conduct of any one of the parties. We must  
“ all be convinced of this, after the many attempts  
“ at perjury and injustice that every judge must  
“ have seen. We must be convinced of the  
“ dreadful facilities which the pursuer’s argument  
“ must give to such attempts on the estates of  
“ others.”

In the various cases which may be figured as likely to occur, any principle of decision which could have been adopted in this case, must lead to dangerous consequences in point of expediency. Accordingly, each party argued upon the inexpediency of the opposite doctrine, if estab-

Chap. VIII. lished ; and views of expediency entered into the consideration of the judges in the opposite and conflicting opinions which they delivered. The law must be defective which leads to such results.

It was stated from the Bench, in 1811, in deciding this case, that the question was not one of general interest, as a similar case might not probably occur for centuries. Mr. Bell, however, mentions, in publishing his report of the case in 1825, that in the short time which had elapsed, the existence of it had nearly been forgotten, and the possibility of raising such a question denied. He had been informed, by one of the Judges of the Consistorial Court, that a similar case had recently occurred ; and he deemed it his duty to comply with the request which had been made to publish the report.

Questions of legitimacy, depending upon uncertain and tedious proof of facts and circumstances, sufficient to infer marriage, are not confined to any rank of life, or class of society. In a recent case of declarator of legitimacy, it was held competent to take a proof on commission, (in order to avoid the expense of a trial by jury,) with regard to the marriage of the parents, in respect of the poverty of the pursuer, and the necessity of the case. The pursuer was a journeyman wright, earning fifteen shillings weekly. His mother, upon the validity of whose marriage his legitimacy depended, was of low rank, and, it was alleged, had been married to another person during

the life of his father, who had died in opulent circumstances in his rank of life. It was stated, that the examination of sixty or seventy witnesses would be necessary for the decision of the case\*.

The next case which shall be mentioned†, although attended with little difference of opinion upon the Bench, strongly marks the grievous hardship which may take place from the state of the law of marriage in Scotland. M'Gregor raised an action of declarator of marriage before the Commissaries of Edinburgh, against the natural daughter of the late Dr. James M'Neil of Stevenston, and alleged that an irregular marriage had taken place between them in spring, 1816, followed by consummation; and that soon thereafter, the marriage was celebrated by a licensed clergyman. The alleged previous private marriage was denied. It was alleged, that the proclamation of banns had been improperly obtained, and that the marriage, which was celebrated, had taken place under threats of personal injury to herself, and to a person of the name of Jolly, to whom she was then engaged to be married. Miss M'Neil was soon thereafter married to Jolly, and M'Gregor was in the habit of visiting them, and repeatedly addressed them as married persons. The validity of the marriage with Jolly, was not disputed until after the death of

\* *Adair versus Adair*, March 3, 1827.—*Shaw's Reports*.

† *M'Neil or Jolly, versus M'Gregor*, Dec. 2, 1825.

Chap. VIII. Dr. M'Neil, when his estate became vested in his daughter by the deeds which he had executed. M'Gregor then brought a declarator of marriage, and it was finally decided by the Court of Session, that the marriage with M'Gregor was binding upon the parties, and, consequently, that the issue of the marriage with Jolly was illegitimate.

In considering the inexpediency of the law of Scotland, it does not seem to make any material difference, whether the marriage with M'Neil had been celebrated by a clergyman, or had been constituted by the evidence of such facts and circumstances as the law sustains to be equivalent to the actual celebration of marriage. The conduct of M'Gregor, although inconsistent with that of a husband, and plainly leading to the presumption, that he never would have stated his claim unless from the benefit to be derived from the estate, conveyed by Dr. M'Neil to his daughter, was not considered a legal bar, *personali exceptione*, to preclude him from insisting in his rights, as the husband of M'Neil, although he lived in the immediate neighbourhood, while Jolly considered himself the father of several legitimate children by his putative marriage. This case is under appeal to the House of Lords.

The case of Ross, who must remain illegitimate in England, the residence of his parents, and the place of his birth, and who acquired the *status* of legitimacy in Scotland, was stated in the preceding chapter. The consideration of it is strictly

applicable to the views which may be entertained Chap. VIII, as to the inexpediency of admitting legitimization by subsequent marriage. It may, however, not improperly be now referred to, as an instance of the inconveniences arising from opposite and conflicting laws, in countries connected and situated as England and Scotland stand, and as illustrating the influence of law upon the manners of society, and the effects which that influence may produce in point of example.

The tendency to immorality which arises from the state of the law of marriage in Scotland, may be illustrated by a statement of several other cases which have recently occurred. In May, 1820\*, Chapman raised an action of declarator of marriage against Mrs. Patullo, on the allegation that a marriage had been acknowledged, and that they had lived for some days as man and wife. In July thereafter, Lindsay, who was then living with Mrs. Patullo as her husband, also raised a declarator of marriage against her, averring, that prior to the marriage which was alleged to have taken place with Chapman, a marriage had been completed with him by promise *subsequente copula*. The question at issue, and decided by the Court, regarded the admissibility of the brother and sister of the woman as witnesses. The inexpediency of a law, which admits of the competition of two parties for the character of husband, to be decided

\* *Lindsay versus Chapman*, Feb. 23, 1826.

Chap. VIII. upon a proof of such facts and circumstances as infer the constitution of marriage, is apparent. This inexpediency, and the frequent occurrence of such instances, are exemplified in the case of *Hamilton versus Wyllie and Son*.<sup>\*</sup> Hamilton, the second son of a respectable landed proprietor, formed an illicit connexion with the respondent, then a servant in his mother's family, who became pregnant. Hamilton accompanied Mrs. Wyllie, and some of her relations, to the office of the Procurator Fiscal of the burgh of Glasgow, and obtained a form, practised in that and some other burghs in Scotland, of celebrating irregular marriage, by presenting a petition to the Magistrates, stating that the parties had been irregularly married, and praying for fine or imprisonment; on which the parties emit a declaration, confessing the charge, and are sentenced to pay a fine. They obtained an extract of the sentence to serve as a proof of the marriage. In the Burgh Court of Glasgow, printed copies of such petitions, declarations, and extracts, are kept, with blank spaces ready for inserting the names of the parties, which plainly marks the frequency of this mode of constituting marriage. In this instance, Hamilton attempted to release himself from his obligation by offering to prove, that unknown to him, previous to the marriage, Mrs. Wyllie had carnal connexion with his brother. Hamilton

<sup>\*</sup> *Hamilton versus Wyllie and Son*, May 26, 1827.—Shaw's Reports.

deserted her. She, for sometime, accepted alim-  
 ment for her son as a natural child, and on one  
 occasion signed an acknowledgment for "a sum  
 "agreed to be received by me for the aliment of  
 "a natural child, in terms of my agreement."  
 She afterwards raised, in the Commissary Court,  
 in her own name, and in that of her son, an ac-  
 tion of declarator of marriage and legitimacy, ad-  
 herence, and aliment; and Hamilton's defence  
 against that action was not sustained. It was  
 stated on the Bench, that a remit had been made  
 to the Lord Advocate, in consequence of the pro-  
 cedure in a previous case, and that it was hoped  
 some steps would be taken to check the practice of  
 affording such facility to the completion of clandes-  
 tine marriage. In the case alluded to\*, Mary Brown  
 prevailed, in an action of declarator of nullity  
 of marriage and putting to silence, against John-  
 stone, on the ground, that at the time when she  
 declared an irregular marriage before a Justice of  
 the Peace, and for the three days thereafter, dur-  
 ing which she lived with Johnstone, she was in-  
 capable, by reason of stupefaction, occasioned by  
 intoxication, of giving a rational consent, or un-  
 derstanding what she did.

The last case decided in Scotland, to which re-  
 ference shall be made, is that of *Black versus*  
*Black*.† In this case, in September, 1814, Mr.  
 Black and Miss Gossen, both natives of Ireland,

\* Shaw's Reports, *Johnstone v. Brown*, 13th Nov. 1823.

† *Black versus Black*, 6th July, 1826.—Shaw's Reports.

Chap. VIII. came from that country to Portpatrick, where they were married, and returned to Ireland on the following day. They lived together as husband and wife till 1815 or 1816, and had a son. Black deserted her, upon the allegation, that she had committed adultery. She formed a residence in London, and he continued to remain in Ireland till April, 1823, when he took up an establishment in Scotland. After having been forty days in Scotland, he instituted a process of divorce before the Commissaries, in which he called his wife as defender by edictal citation, upon the footing that his domicile in Scotland, and the *locus contractus*, gave jurisdiction to the Commissaries of Edinburgh. Decree of divorce was, upon proof, taken *ex parte*, obtained in absence. After obtaining decree of divorce in October 1823, Black resided in Ireland till May, 1824, when he came to Scotland, was again married, and thereafter returned to Ireland. In July thereafter, an action of reduction was raised of the decree of divorce, by his first wife Gossen, upon the grounds that the edictal citation was not a sufficient intimation of the procedure before the Commissaries, who had no jurisdiction over her in the circumstances of the case. The Court decided upon special circumstances, and set aside the decree of divorce pronounced by the Commissaries. The second marriage was, therefore, not valid.

The hazard to which parties are exposed, by the manner in which marriage may be fixed, or

attempted to be fixed, on persons in Scotland, is Chap.VIII. exhibited in a case of recent occurrence.\* Mr. Gordon, after establishing his right to an entailed estate in Scotland, in which he was opposed for years, on the ground of alleged illegitimacy, formed a suitable connexion by marriage regularly celebrated. In the course of a short time after his marriage, Mrs. Jane Duncan, upon the ground of promises or acknowledgments of marriage, accompanied with personal intercourse, raised an action before the Commissaries, containing alternative conclusions for declarator of marriage, or of damages for seduction, stated at £5000, and upon the depending process, executed inhibition against his heritable estate, and arrested the rents in the hands of his tenants. The Court refused to recall the inhibition, unless upon caution to the extent of £1500, in addition to caution for £1000, previously given, in order to enable Mr. Gordon to recover the rents due by his tenants. Soon after the judgment of the Court upon this point, Mrs. Duncan presented a petition to the Commissaries, praying that her summons might be dismissed as defective in certain particulars, reserving right to her to bring a new action. Upon this ground, the inhibition was recalled.† Mrs. Duncan has accordingly raised another action of declarator of marriage, which is in dependence before the Commissaries, and it would, therefore,

\* Shaw's Reports, *Gordon versus Duncan*, 8th March, 1827.

† 12th May, 1827, Shaw's Reports.

Chap. VIII. be improper to enter into any detail of the case.

Whatever the result may be in that instance, the statement of the procedure is sufficient to exhibit a view of the hazard to which parties are exposed by the loose and vague manner in which marriage may be constituted, or may be attempted to be established by a proof of latent and concealed facts and circumstances, inferring its constitution.

It has lately been attempted in England, in a case of general notoriety, to render the law of Scotland subservient to purposes of the most base and deliberate fraud, which can be committed against the peace and happiness of a family,—a fraud, which was not even extenuated by standing connected with the impulse of youthful passion, but which was systematically devised for the sole purpose of gratifying insatiable avarice. Miss Turner's father had the means of remedying, (as far as it admitted of a remedy,) the irreparable injury which was inflicted by the Wakefields.\* In many cases, however, which may be figured, and which may readily occur, frauds may be practised, in a manner, in which even the reparation which has been made in that case, is unattainable.

Another point connected with this discussion, deserves consideration. The evidence upon which cases of matrimonial connexion must depend, is

\* *King versus Wakefield*, March 24, 1827.

frequently of a most painful description. The ac- Chap. VIII.  
 knowledgments of marriage *de præsenti*, or of  
 promises *de futuro, subsequente copula*, generally  
 are attended with circumstances, which render it  
 difficult to avoid the necessity of examining persons  
 as witnesses whose feelings are apt to be strongly  
 excited. Knowledge of occurrences founded upon  
 as sufficient to infer proof of sexual intercourse,  
 which generally enters into consideration in such  
 discussions, is, in a great measure, confined to those  
 who are intimately connected with the parties.  
 Accordingly, it has occurred in many cases, that  
 from an alleged *penuria testium* attending proof  
 of connexion of an occult and private nature,  
 the necessity of examining the near relations of  
 the parties, has been strongly urged. The de-  
 moralizing tendency of frequent discussions of  
 this nature, and the temptations thus held out to  
 prevarication, if not to perjury, are calculated to  
 produce the most dangerous consequences.

Before concluding this branch of the subject, it  
 may not be improper to point out some of the in-  
 consistencies connected with it, which take place  
 in the law of Scotland.

It has been stated by Mr. Hume,\* that the law  
 of Scotland “ by no means approves, or would  
 “ encourage, the contracting of marriage in this  
 “ private and unceremonious fashion ; attended as  
 “ it is, with the plain hazard, not only of rash and

\* Commentaries, vol. II. chap. 49. p. 323.

Chap. VIII. "unsuitable matches, but of incestuous, adulterous, or otherwise unlawful alliances. On the contrary, it bestows on all marriages of this description, the name of clandestine and disorderly, and holds no marriage to be right or inoffensive, but that which is celebrated by a priest duly authorised by the church, and after proclamation of banns." Accordingly, by special statutes, penalties are imposed upon the parties, the witnesses, and the celebrator of clandestine marriages. But, from the decisions which have been referred to, and the principles of law which have now been established, applicable to the evidence sufficient to constitute and support marriage by declarations *de præsenti*, or by promises *subsequente copula*, it is obvious, that the law permits marriage to be established in a manner still more loose and vague, and with less appearance of that regularity and decorum, than that for which penalties are inflicted, if the parties are so foolish as to incur them. The law puts it in their power completely to attain their object, without having recourse to those measures, or adopting those forms by which the statutory penalties are incurred. In so far as now enforced, the statutes enacted for the express purpose of preventing clandestine marriage, have been converted into the means of rendering such marriages effectual. The parties go before a magistrate and confess their irregular marriage, and a nominal fine is awarded. The decree is evidence of the marriage.

The frequency of the practice has been mentioned **Chap. VIII** in stating the case of Hamilton, in May, 1827.

Another inconsistency of the law may be mentioned. The offence of bigamy is criminally and severely punishable; and it is an incontrovertible maxim in criminal law, that a person should not only, not be exposed to punishment, but that he should not be exposed to the degradation of trial for an offence so ill defined, that it may have been committed in ignorance. Mr. Hume,\* accordingly, states the question, whether, in trials for bigamy, both must be marriages “by formal celebration? or if it will be sufficient, though both “or one of them be contracted in that loose and “unceremonious fashion, which is sustained by “the custom of Scotland?” He gives his opinion in the following terms:—“In this (as it must be “admitted to be) both delicate and important inquiry, we have as yet no aid of precedent, nor “even of argument or debate, to guide us. It “is, however, obvious, in favour of the more lenient opinion, that it has the countenance of the “general strain, and of several of the expressions “of the statute (against bigamy), which was made “at a time when there was no marriage without “celebration; and which, in applying the pains “of perjury to this offence, plainly supposes the “contempt of a solemn oath or vow, and an abuse “of the service of religion.”

\* Commentaries, vol. II. chap. 20. p. 316.

**Chap. VIII.** The offence of adultery is likewise punishable by statute; and notour (as it is termed in the law of Scotland) or continued adultery, is a capital offence, and the punishment of death has been inflicted for it.\* A prosecution may be brought, either at the instance of the injured spouse, or the public prosecutor, whose instance is independent of the concurrence, or even of the remission of the private party, as was decided in 1694; and Mr. Hume observes,† that it may sometimes depend on the prosecutor's pleasure to libel the same fact as bigamy, or as notour adultery (*i. e.* by procreation of children, or open cohabitation of the parties), under which last appellation he may even relevantly insist in a capital conclusion; instances of which are mentioned as having occurred in the years 1607 and 1673.

It thus appears that a person may incur the degradation of a public trial for bigamy, or for adultery, without having any certain knowledge of the validity of his marriage.

Another instance of inconsistency in the law of Scotland may be mentioned. The statute 1696, c. 31, "renews and revives all former laws and "Acts of Parliament made against drunkenness, "sabbath breaking, swearing, fornication, un- "cleanness, mocking and reproaching religion, "and the exercises thereof, and generally all the "laws made against profaneness; and ordains

\* Hume on Crimes, vol. II. p. 312.

† *Ibid.* p. 322.

“ the same to be put to full and vigorous execu- Chap. VIII.  
 “ tion.” One of these laws, thus ordained to be  
 put to full and vigorous execution, is intituled,  
 “ Anent the filthie vice of fornication and punish-  
 “ ment of the same.” By this statute, in the  
 reign of James VI. 1567, c. 13, fines are to be in-  
 flicted upon both parties, under pain of imprison-  
 ment for eight days, and thereafter standing at  
 the market-place for two hours, bare-headed ; for  
 the second offence, the fines or time of imprison-  
 ment are to be doubled, and the heads to be shaved  
 when exposed at the market-place ; and for the  
 third offence, the fines and term of imprisonment  
 to be tripled : for a continuance in a course of  
 iniquity, the parties are to be thrice ducked in  
 the deepest and dirtiest pool of water of the pa-  
 rish, and thereafter banished for ever.

In many parts of Scotland, fines are still  
 levied under the above statutes ; and it has not  
 yet been ascertained whether, by a conve-  
 nient mode of dispensing statutory law, other  
 parts of the act may, or may not, have fallen into  
 disuetude. It is, however, quite obvious, that the  
 parents of the offspring arising from such inter-  
 course, are exposed to punishment by one law ;  
 while, by the law of legitimation by subsequent  
 marriage, such offspring may be legitimate upon  
 the presumption or fiction of law in favour of  
 marriage, by which the parents are held to have  
 been husband and wife at the period when the

**Chap. VIII.** intercourse took place, which may have led to their punishment, and the birth of a legitimate child.

It is, no doubt, true, that the mild administration of the law which now happily prevails, relieves the minds of men from the fears which such laws and such inconsistencies were calculated to create at no very remote period. These instances of inconsistency are, however, too remarkable to be passed unnoticed, in stating the inexpediency of the law upon so important a subject.

In concluding this chapter, it may be proper to bring again into view, that marriage may be contracted in a clandestine manner in Scotland, during the minority of either or of both of the parties, exposed to all the hazards, and open to all the objections which occur to this mode of its constitution, even by persons who have attained the age at which the law presumes that they are capable of managing their own affairs.

The injurious consequences arising to society from clandestine marriages, affecting the general interests of the British empire, will be resumed in the following chapter.

## CHAPTER IX.

ON THE INEXPEDIENCY OF THE LAW OF MARRIAGE IN SCOTLAND, AS AFFECTING THE GENERAL INTERESTS OF THE BRITISH EMPIRE.

IN considering this subject, it may be useful to Chap. IX. trace the connexion between England and Scotland from the period of the union of the crowns, in so far as it can affect, directly or indirectly, the subsisting law of marriage in either kingdom. It will thus distinctly appear, that until within a recent period, it was not of the slightest consequence to either nation, whether the law of marriage corresponded, or was different in England and in Scotland. From the increased intercourse which has, happily for both countries, taken place, England and Scotland may now be rather considered as provinces of the same empire, with united interests and feelings, although, to a certain extent, living under separate municipal institutions, and governed by local customs, arising from having been, for a long period of time, separate and independent kingdoms. The advantages and mutual benefits accruing to the whole provinces of the same empire, by reciprocal and

**Chap. IX.** unrestricted intercourse, are unquestionable. The laws with regard to trade and commerce have been assimilated. The manners of the two countries are gradually and insensibly assuming the same tone and temper; and frequent intercourse by marriage is rapidly increasing the ties of family connexion throughout the whole united kingdom. It is, therefore, of national importance, that the law of one part of the country, upon a point of most extensive and general application, should not remain in a state which is productive of the most mischievous consequences to itself, and which not only holds out, openly and publicly, the means of violating and transgressing the established law in the other parts of the united kingdom, but which exposes to imminent hazard most important rights and interests, involved in the consequences of free and unlimited intercourse.

At the period of the union of the crowns by the succession of James VI. of Scotland to the English throne in 1603, the prejudices and antipathies which prevailed in both countries, were calculated to preclude matrimonial connexions.

The prevalence of those hostile feelings is strongly marked by the terms of an English statute, which was passed soon after the accession of James VI. to the English throne, enacted for the purpose of removing them: it is intituled,\* “An Act for the utter abolition of all memory of

\* 4th James VI. c. i. anno 1605.

“hostility, and the dependance thereof between Chap. III.  
“England and Scotland, and for the repression of  
“the occasions of disorders in time to come.”  
The act specially enumerates and repeals several  
English statutes hostile to Scotland, and declares,  
that “if there had appeared any other statute of  
“the Realm of England, wherein any thing is  
“ordained, enacted, or established, expressed,  
“and binding against Scotchmen as enemies, or  
“Scotland an enemy country to the King of this  
“Realm, or the state of the same, we should, for  
“so much of them as had concerned Scottishmen  
“or Scotland, have utterly abrogated and annul-  
“led the same; seeing all enmity and hostility of  
“former times, between the two kingdoms and  
“people, is now happily taken away, and under  
“the government of his Majesty, as under the  
“parent and head, turned into fraternity and bro-  
“therly friendship.” This act provides, that the  
parliament of Scotland shall make a full and ample  
declaration for the repeal of all hostile laws  
in Scotland against England, as well as those  
enumerated in the act.

One of the repealed Scotch statutes may be mentioned, as exhibiting the state of the feelings subsisting between the two countries, previous to the union of the crowns. It was enacted in the reign of James VI., previous to his accession to the English throne, that a Scotchman should not presume to marry an Englishwoman dwelling in the opposite marches, without the express leave

Chap. IX. of his Majesty under the great seal, under pain of death, and confiscation of moveables. This statute proceeds upon the preamble :\* " Sen. experientie declares, that the marriage of the king's majesty's subjects upon the daughters of the broken men and thieves of England, is not only an hinderance to his majesty's service and obedience, bot alsua to the common peace and quietness betwixt baith the realms."

Although a Scottish monarch was received by the English as their sovereign, feelings of national antipathy were not subdued or mitigated, and the intercourse between the two countries was extremely limited and circumscribed. The Scotch were considered as aliens, incapable of holding land, either as proprietors or tenants, in England. Every attempt to obtain an act of naturalization of Scotchmen, was keenly opposed in the English parliament. The question was, however, set at rest, as to succeeding generations, by the opinions delivered on the first day of the second conference between the two Houses of Parliament, by eleven out of the twelve judges of England;† that " such of the Scotch as have been, or shall be born in Scotland, since his Majesty's coming to the crown, were not aliens, but are inheritable in this realm, by the law as it now stands in force, as native English."

Mutual feelings of antipathy still, however,

\* 11th James VI. c. 104. 1587.

† Parliamentary History, anno 1606.

continued to prevail. From these acting in combination with mistaken views of policy, or self-interest, a statute was passed in Scotland in 1663, prohibiting the importation of English manufactures, unless upon payment of duties, which amounted to exclusion. The incorporating union with England in 1707, laid a foundation for securing to both kingdoms, all the advantages to be derived from unlimited and unrestricted intercourse in commercial transactions, and all the benefits which flow from the prevalence of corresponding interests, in the different parts of the United Kingdom, gradually leading to increased domestic connexion.

By the 18th article of the Treaty of Union, ratified by statute in 1707, between England and Scotland, it is provided, " That the laws concerning regulation of trade, customs, and such excises, to which Scotland is by virtue of this treaty to be liable, be the same in Scotland, from and after the union, as in England; and that all other laws in use within the kingdom of Scotland, do, after the union, and notwithstanding thereof, remain in the same force as before (except such as are contrary to or inconsistent with this treaty), but alterable by the Parliament of Great Britain; with this difference betwixt the laws concerning public right, policy, and civil government, and those which concern private right, that the laws which concern public right, policy, and civil government,

Chap. IX. " may be made the same throughout the whole  
" united kingdom, but that no alteration be made  
" in laws which concern private right, except for  
" evident utility of the subjects within Scotland."

This provision was necessary, both for the purpose of allaying the discontents, and removing the objections to the union, which prevailed in Scotland at that period, and for the purpose of preventing the inextricable confusion which would have taken place, if the established municipal laws of Scotland had not been preserved entire. At the period of the union, the commerce and trade of Scotland were so limited and circumscribed, that the existence of mercantile law can scarcely be traced or acknowledged. Even in England, the period is not remote when some of the branches of mercantile law acquired that degree of uniformity and consistency, which can only be established by the repeated application of fixed general principles, to cases of frequent occurrence. In those branches of law, an extensive intercourse between the countries, naturally tends to the adoption into the law of Scotland, of those principles which have been found productive of general benefit in regulating the more enlarged and extensive commerce of England.

It was not till the year 1753, nearly half a century after the union with Scotland, that the important change was made in the marriage law of England, for the purpose of restraining the licentiousness, and preventing the many evil conse-

quences which arose from the facility of contract-  
ing marriage without duly and deliberately estab-  
lishing its validity, and without affording ac-  
cessible evidence of the subsisting engagement.  
A flagrant instance, in which the rights of a wife  
were claimed upon the grounds of previous mar-  
riage, after the death of a gentleman who had  
lived for many years as the husband of a lady of  
family and fortune, by whom he had several chil-  
dren, excited sympathy and attention. The griev-  
ance arising from the state of the law, which, at  
that period, permitted marriage to be contracted  
in England with the same facility as in Scotland,  
had been universally complained of, and the dis-  
graceful instance of the abuse of it, in the case to  
which allusion has been made, was the immediate  
cause of the marriage act having been passed in Eng-  
land in 1753.\* The bill was prepared by Lord  
Hardwicke, but many alterations were made upon  
it from the feelings which prevailed in the House  
of Commons. Experience may show in what re-  
spects the statute has been attended with incon-  
venience in England, arising in a great measure  
from the various formalities required by it. In  
one most material respect, great advantages are  
enjoyed in Scotland for the establishment of the  
law of marriage upon principles of safe and uniform  
application. The advantages enjoyed in Scotland  
for centuries, by the regular establishment of re-

\* Hansard's Parliamentary History.

Chap. IX. eords, upon principles of public utility, prepare the population of the country for the extension of that system to the law of marriage, as the benefit of easily accessible records in important transactions has been strongly manifested and universally acknowledged. The establishment of an easily accessible register, as the only admissible evidence of the constitution of marriage, accords with the manners and habits of a nation who have been long accustomed to trust to such an establishment, as the best security for their patrimonial fortunes.

It is not necessary that the law of Scotland should be infringed upon, or altered, for the purpose of rendering the law of England more effectual. All that can be required is, that, in a matter so vitally affecting the interests of both countries, the best possible law should be established in Scotland, consistent with its existing municipal regulations, and the state of society, and the habits and manners of the people, in other respects. No alteration of the law is necessary, "except for evident utility of the subject within Scotland," as expressed in the articles of union with England. If it shall appear, upon due consideration, that the law of Scotland may be improved, upon a point in which it is essential that there should not only be a good, but the best possible law, it surely forms a strong and additional argument in support of the alteration, that while it is of evident utility to Scotland, it likewise

operates advantageously, for England in rendering chap. IX. effectual such laws as have been, or may be established in that country; and for both countries, by removing all grounds for suspicion or distrust, in the progress of extensive intercourse.

The various respects in which the inexpediency of the law produces mischievous consequences, may now be brought clearly and distinctly into view, with reference to the detailed statements which have already been made, upon the separate points, and without argument or illustration. From the increased and increasing intercourse which now takes place between Scotland and the other parts of the united kingdom, the evil extends over the whole British Empire.

1. In so far as regards the constitution of marriage by evidence of mutual declarations *de presenti, per se*, a most loose, vague, and uncertain mode of giving effect to the intention of parties, is sanctioned in the mode of creating an obligation, which the rights of individuals, and the interests of society, concur in requiring to be established in a manner which leaves no room for uncertainty or doubt. The law of marriage is contrary to the established general principles of the law of Scotland in all other important mutual contracts, by which parties are allowed an opportunity to resile, *rebus integris*, until a regular contract is completed.

2. The dangerous consequences attending the constitution of marriage, by evidence of the mere

Chap. IX. declaration of parties, whether verbal or written, without any prescribed form, is increased by the circumstance, that such declarations are liable to misconception upon the part of witnesses, and may be accompanied with qualifications, which, in legal construction, convert a declaration *de presenti* into a promise *de futuro*. Certainty and uniformity in judicial decision, under such a state of the law, are not attainable.

3. These dangerous consequences are still further increased, as it generally enters into the view of the contracting parties, that the engagement shall remain private or concealed, until it shall meet their views to make the disclosure, and from the interval of time which thus occurs, the evidence of witnesses must be open to doubt and uncertainty; or the claim may not be brought forward until after the death of one of the parties, whose friends, from their entire ignorance of the occurrences, may be unable to trace the whole material circumstances, and to detect the falsehood of the partial evidence which may be adduced.

4. The mischievous consequences, above enumerated, affect not only the parties themselves, who have made such declarations, and who may remain in a state of uncertainty as to their legal effects; but may injure the rights and destroy the happiness of others, who may innocently stand connected with one of the parties by the ties of matrimonial and parental duties, in total igno-

rance of any latent engagement which could be Chap. IX.  
opposed to the effects of a regularly celebrated  
marriage.

5. The dangers arising from the mode of constituting marriage by the mere declaration of parties, is still further increased by this consideration, that the engagement may be entered into during minority, with all the appearance of immediate deliberation at the moment of expressing it, but without that previous deliberation which such a momentuous engagement requires, and full knowledge and conviction of its irrevocable nature. Such a declaration may be elicited without previous determination, and if not followed by such intercourse and circumstances as change the situation of parties, and fix the obligation indelibly upon the mind, may be forgotten or considered as departed from, until a claim is made after a matrimonial union has been formed inconsistent with such declaration.

6. It is impossible for courts to apply the principle of law, that marriage may be contracted by mutual declarations *de præsenti*, with that degree of certainty which gives utility to, and confidence in, judicial decision; as almost all questions of this nature must depend upon the interpretation which is to be given to evidence of so doubtful a description, as generally to leave the parties themselves at a loss to determine, whether any legal or binding obligation has been contracted, for the enforcement of which, one of the parties involves the

Chap. IX. other in the hazard of litigation, affecting the most important rights, and the legitimacy of families.

The inexpediency of allowing marriage to be constituted by evidence of a promise followed with sexual intercourse, or even by declarations *de presenti*, accompanied with such intercourse, without any prescribed form, may likewise be stated without argument or illustration.

1. The application of this principle must be attended in most cases with doubt and uncertainty, arising both from the situation of the parties at the time when such promises are usually made, and the manner in which such proof is generally brought forward after an interval of time.

2. The constitution of marriage by evidence of a promise *subsequente copula*, has a strong tendency to promote vice and immorality, and to throw obstacles in the way of suitable matrimonial connexions. Such promises are, in many cases, merely expressions used at an unguarded moment; or are artfully elicited and kept in remembrance till a fit opportunity occur for bringing forward claims subversive of the rights and interests of innocent parties. The fiction of law, that the intercourse following upon a promise, expresses a present mutual intention to constitute marriage, is seldom well founded in point of truth, and is generally contrary to the fact, in the case of one of the parties.

3. The discussion of the facts necessarily connected with the constitution of marriage by proof of promise *subsequente copula*, strongly tends to the contamination of public morals; and the witnesses by whose evidence it is supported, generally stand so connected with one of the parties, whose situation in society depends upon the result of the discussion, that they are exposed to the strongest possible temptations to transgress the bounds of veracity, or to give highly coloured, if not false evidence. Chap. IX.

4. By allowing marriage to be constituted upon evidence of promise *subsequente copula*, remaining latent, the legitimacy of families, the offspring of suitable connexions is exposed to the hazard of legal discussion, at the period when it may best suit the views of parties of doubtful or suspicious character, to bring forward their claims.

The inexpediency of permitting marriage to be constituted, even by regular celebration, or merely by habit and repute, without preserving legal evidence of its constitution by means of an established record, is obvious. In every case of disputed marriage, or of disputed legitimacy, recourse must be had to judicial procedure, and evidence by written or parole testimony. By rendering it necessary to record every marriage, as essential to its constitution, the rights and interests of all parties may be easily and at once protected.

By removing its existing defects, the law of Scotland may be improved, and the benefit of

Chap. IX. such improvement will extend itself to England.

In the case of Dalrymple, the rights of an English minor were, by his accidental residence in Scotland, subjected to the control of Scotch law, and the domestic peace and happiness of an English lady were involved in the discussion, and in the uncertainty attending the application of the principles of that law to matrimonial engagements.

From the increased and increasing intercourse between Scotland and the other parts of the united kingdom, the consequences arising from the application of the law of Scotland upon the subject of marriage, cannot be confined within the boundaries of the country.

In publishing the report of four cases, decided in 1816, in the Supreme Consistorial Court of Scotland, relative to the jurisdiction of the Commissaries in cases of divorce, Mr. Fergusson, whose knowledge was founded upon the experience of many years, as one of the judges of that court, makes some remarks, which, by analogy, may be applied to the subject under consideration. He says, "Painful as is the predicament for a  
" court of justice to be placed in, of being obliged  
" to dissolve all foreign marriages, when jurisdiction merely has been constituted, although this  
" shall be done in evident hostility to the law,  
" both of the contract and of the real domicile of  
" the parties; and, at the sametime, of exposing  
" all who, after marrying in any part of the empire beyond the limits of Scotland, obtain di-

“ vorce in this country to the punishment of bi- Chap. IX.  
“ gamy, in case they shall contract a second mar-  
“ riage under the English law : it is nevertheless  
“ manifest, that judges in no department have power  
“ to go beyond that law, which they are appoint-  
“ ed to dispense. Remedial provisions are the  
“ concern of the legislature.

“ The serious evils and dangers which must  
“ necessarily arise from this state of the law, both  
“ to the innocent offspring of parties, and to so-  
“ ciety at large, have been slightly adverted to :  
“ but they are evidently of such a nature and  
“ magnitude, as must strike the most superficial  
“ observer, and excite general alarm.

“ In the relative situation of Scotland, also, to  
“ the sister kingdoms, it is obvious, that the deli-  
“ cacy, difficulty, and importance of those legal  
“ questions which have been under review, have  
“ been infinitely augmented by the complete  
“ political incorporation of all their subjects as  
“ one people ; while the municipal law of this  
“ country, as well as that of England, is, by its  
“ national compact of union, maintained in na-  
“ tional sovereignty and independence. But the  
“ same arrangement has bestowed a parliament,  
“ common to the whole, which can, by statute,  
“ remove collision, and reconcile their different  
“ interests, whenever the slow, and still feeble  
“ operation of international law, the sole media-  
“ tor between the conflicting jurisdictions of un-  
“ connected states, is found to be insufficient for

Chap. IX. "that purpose. Nor can it be doubted, that if  
 "the collision of independent laws and judica-  
 "tures, is really attended with consequences, in-  
 "jurious, in a high degree, to the private but in-  
 "valuable rights and interests of the people in the  
 "respective nations under its care, the work of  
 "adjusting these for the general good, as it is  
 "unquestionably not beyond the competency, so  
 "it will not be deemed beneath the wisdom of  
 "the most enlightened legislature of the world."

From the above statements, and the cases to which reference has been made, it may be inferred that the law of Scotland is likely to be rendered subservient to the purposes of those who wish to evade the law of the country of their birth and residence, both in contracting and dissolving marriage. The intercourse between England and Gretna Green, and between Ireland and Portpatrick, is now so easy and expeditious, that it is almost impossible to prevent the execution of such devices as may be contrived for the execution of base or culpable purposes.

The law of Scotland, upon the subject of marriage, gives rise to discussions, arising from the conduct of the parties beyond its territories. Thus, in the case of *Madame L. Talina Sassen*,\* a marriage was attempted to be established by conduct in France, which, it was maintained, induced her to believe that marriage was constituted ac-

\* *Sassen v. Campbell*, 22d June, 1824.

according to the law of Scotland, of which country Chap. IX. the defender was a native, and in which he possessed heritable property, which might be affected by his engagements. In like manner, in the case of Lord Strathmore, the question occurred, whether marriage, celebrated in England, had the effect of legitimating a son, previously born, so as to raise a claim to Scotch titles and estates.

The general prosperity of the united kingdom, stands intimately connected with the intercourse between all parts of it. The prosperity of Scotland has been wonderfully improved by the increased intercourse which has taken place, for several years, with the more opulent southern division of the island. An approximation of the law of marriage, in so far as necessary to fix a certain rule, of easy application, which removes every degree of doubt with regard to the forms necessary to establish its validity, and which defeats latent claims, arising from clandestine marriage, would be a measure of incalculable benefit to the whole community.

The present state of the matrimonial law of Scotland must, from the increasing intercourse with England, give rise to many perplexing questions, of painful discussion. Many principles of law are involved in these discussions, the application of which must be attended with doubts and uncertainty. The *locus originis* of the parties enters into consideration. The *locus contractus* affects such questions more deeply. The *lex domi-*

Chap. IX. *cili* involves questions of still greater difficulty. From the increased intercourse between England and Scotland, it may frequently be difficult to ascertain the domicile, with the law of which the presumed intention of parties is held to accord, in regulating important rights.

It is not necessary, by any means, to assimilate the law of marriage, in all respects, in England and in Scotland. It is, however, for the manifest benefit of both countries, that a suitable remedy should be adopted, to remove the evils arising from the vague and uncertain manner in which marriage may be contracted in Scotland, by which latent engagements may be brought forward, at any distance of time, affecting the most important rights and interests of persons in both divisions of the island, which it is the object of civil society to protect from unnecessary hazard.

## CHAPTER X.

## CONCLUSION.

It appears from the statements which have been Chap. X. offered for consideration in the preceding chapters, that the mode of constituting marriage by the celebration of it by a clergyman, in presence of witnesses, after proclamation of banns, is, in all respects, unexceptionable, by requiring that deliberate attention, which an engagement of such deep importance to the interests of individuals, and of society demands; and that the only point requiring consideration, relative to the constitution of marriage in that regular manner, is the age at which it should be allowed to be legally contracted, without the concurrence of parents or guardians. It further appears, that in order to render the law of marriage in Scotland as little liable to objection, and as perfect in all respects as is attainable in human institutions, it only seems necessary to establish a record, upon the faith of which, the validity of marriage should depend, regulated upon the same principles which have been attended with such beneficial effects in affording complete security, with the least possible

Chap. X. inconvenience in other important transactions.

If, upon due consideration by those qualified to judge of such a measure, it should be thought expedient to adopt it, proper precautions would of course be taken for giving to it such publicity as would be sufficient to communicate to the whole population of the country the proposed alteration in the law; and the rights of all parties under subsisting declarations or promises, previous to the time fixed for the operation of the statute establishing a register, as essential to the validity of marriage, would be reserved entire, to be decided according to the law as previously subsisting.

It appears from the statements in the preceding chapters, that the constitution of marriage in a clandestine manner, whether by declarations *de presenti*, or by promises *subsequente copula*, have been at all times disapproved of as contrary to religion, morality, and the best interests of society. It further appears, that during the period when the unbounded power of the church was sufficient to restrain and control the licentiousness arising from the constitution of marriage in a clandestine manner, the measures adopted by the church judicatories, were sufficient to repress the prevalence of the evil, to an extent subversive of the good order of society; and that when the power of the church was limited by the influence of the Reformation, the absolute nullity of clandestine marriage was declared by the authority of the

Council of Trent. This provision was soon there- Chap. X.  
after adopted into the law of France, and has  
been adopted into the law of England. The  
principle sanctioned by the canon law, that the  
validity of marriage may be established without  
the observance of any prescribed forms, now pre-  
vails in the law of Scotland, and the hazard and  
mischievous consequences arising out of that sys-  
tem, are not checked or counteracted by any esta-  
blished controlling power. The statutes enacted  
for the purpose of preventing clandestine mar-  
riage, are now totally inadequate and nugatory.

An attempt has been made to trace to its origin,  
the law of legitimation by subsequent marriage.  
Plausible arguments have been urged in support  
of the doctrine. It appears that it is attended  
with many mischievous consequences. If, however,  
those qualified to judge, should be of opinion that  
there is no necessity for altering this branch of the  
law, it may at any rate be greatly improved by en-  
acting, that legitimation by subsequent marriage,  
can only take place by regular insertion of the  
marriage in an established register; and that such  
offspring only, can be held to be legitimated, whose  
names and ages are inserted in the record at the  
period of the marriage. It may, however, be ob-  
served, that questions of disputed legitimacy may  
thus occur, which it would be desirable to avoid.  
Legitimation by subsequent marriage, may not  
take place until after the death of a younger mem-  
ber of the family, leaving lawful issue. The sur-

Chap. X. **viving elder members of the family, and their descendants, would be legitimated by the subsequent marriage, which is held to have taken place previous to the birth of the oldest child, but the *status* of legitimacy never having been conferred upon the deceased younger member of the family, the right of inheritance could not flow from that person who had lived and died a bastard, although the marriage of his parents is afterwards held by law to have taken place previous to the birth of the oldest member of the family, who would thus be legitimated.**

It may not be improper to conclude these considerations upon the inexpediency of the subsisting law, and suggestions for a remedy offered to the public by an humble individual, as a subject of useful inquiry, with some remarks upon a point which is brought forward in every discussion of the kind, and frequently without any defined or well-digested views, necessary to lead to a correct opinion upon the important question of the dangers of innovation.

It may be assumed as an incontrovertible proposition, that the arguments in favour of innovation, or hostile to innovation, if pushed to an extreme upon either side, are perfectly untenable. On the one hand, improvement of every description would be precluded, and on the other hand, the good order of society would be disturbed by speculative and rash attempts to remove imaginary or real grievances. The opposite extremes

lead to conclusions and consequences which it is Chap. X. impossible to support. Innovation may be salutary and fit for adoption, or it may be dangerous, and therefore such as should be rejected, in the proposed attainment of many of the intermediate objects which occur between the two extremes. In order to ascertain, whether there exist any cause, or ground for innovation, it is necessary, in the first place, to investigate, with accuracy, the subsistence of the evil for which it is proposed to apply a remedy,—the causes from which it proceeds,—and the effects which it is calculated to produce,—and whether these effects are of such extensive operation and influence, as to render any change in the subsisting system eligible and suitable. In the next place, it is to be considered whether the remedy proposed to be applied, is likely to produce the beneficial consequences anticipated from it, or whether by infringing upon established habits, or by suddenly displacing subsisting interests, it may not produce consequences more injurious than the evil for which a remedy is attempted to be applied. In order to arrive at a correct conclusion, with regard to any proposed alteration in the established system, every point connected with it ought to be duly and deliberately considered by those in whom confidence is placed, for talent, experience, and practical knowledge in the particular department connected with the subject. In this manner only can beneficial results be expected to follow, by conduct equally removed from the suspicion of opposing

Chap. X. all improvement, by declamatory invective against the dangers of innovation ; and from the charge of rashly adopting what is new, without duly appreciating the benefits which may continue to be derived from what has been long established.

The experience of mankind contradicts the assertion of those who refuse assent to the validity of such principles as have been stated. Upon these principles, all progressive improvements have proceeded, and have been carried into execution. The field labour of the spade has been superseded by the use of the plough ; manual labour has, in many instances, yielded to the improvements which have been accomplished by the use of mechanical powers ; and the dominion of man over the elements, has been enlarged by the application of steam to the purposes of navigation.

In like manner, improvements have proceeded in the laws of every country, and in the forms of administering law, in its gradual progress from barbarism to civilization and refinement,—sometimes by laws made at once to meet particular emergencies, and at other times, by the gradual and almost imperceptible effects of the changes which arise in the state of society and manners, affected by the various objects and pursuits in which men happen to be engaged. The truth of these remarks may be illustrated by examples drawn from the statute law, and the common law of Scotland. The security which tenants enjoy, by special statute, for their rights under

leases was an innovation upon the former law, by Chap. X. which, for the benefit of the country, the right of tenants was rendered effectual against purchasers of the lands, in the same manner as if they had stood infest during the period specified in the contract of lease. This innovation upon the ancient law, took place in opposition to the influence of the feudal system, which, at the period when the statute was enacted, was in vigorous operation. The admissibility of women as witnesses in civil cases, has been received into the law of Scotland, without any statutory authority, and the gradual progress of the law illustrates the innovations which have taken place. In 1558, in a case relative to the age of a girl, the examination of two ladies "was absolutely repelled and refused by "the Lords;" and, it is said in the report of the case, that "they would receive no women for "probation or witness."\* In 1675, it would appear that the testimony of women was received in domestic matters, in which the evidence of men could not be obtained, such as the birth of children. The Court decided, that the loan of a bed, "was relevant to be proved by habile witnesses, but refused to admit women "witnesses."† In 1709, the Court "sustained "the defender's objections, and refused to sustain "women witnesses as habile to prove that Captain "Forbes and Ann Price were married or habite

\* Lady Coluthie *versus* Carnegie, 6th July, 1558.

† Wilkie *versus* Morison, 21st July, 1675.

Chap. X. "and repute as married persons, because, in notoriety, *penuria testium*, cannot be presumed."\*

Even so late as the time when Mr. Erskine published the Institutions of the law of Scotland, he limits the cases in which the evidence of women is admissible, to facts of a domestic nature, such as clandestine marriage, and cases where there is *penuria testium*. Different views, however, began then to be entertained; and Mr. Erskine states the absurdity of affirming, that the law rejected the testimony of women from any supposed incapacity; and he adds, "It would, therefore, be more agreeable to the character justly due to the softer sex, in point of capacity, to say, not that women are debarred, but that they are excused, from bearing testimony in courts of law, except where there is a penury of witnesses, in which case, their giving evidence is necessary."† It is, however, clear, from the statements in the reports of old decisions, that the objection to female witnesses, did not proceed upon the ground stated by Mr. Erskine. The language of courtesy, in which he states his opinion, arose from their improved condition in the state of society, which removed the objections formerly stated to female testimony in civil cases. An objection to a witness on account of her sex, would not now be listened to for a moment.

\* *Forbes versus Forbes*, 12th July, 1709.

† *Ersk B. IV. tit. II. sect. 22*

Even at the period of the Lateran Council, in Chap. X. 1215,\* the true principles applicable to the doctrine of the hazard of innovation, are distinctly acknowledged. In making an alteration in the degrees of consanguinity, within which marriage is forbidden, it is stated, that it ought not to be deemed reprehensible, if, according to the change of times, human laws are occasionally altered, especially when urgent necessity, or evident utility, requires the change; since even God himself altered some of those laws in the New Testament, which, in the Old Testament, he had appointed to be observed. The words are emphatic—"Non debet reprehensibile judicari, si secundum varietatem temporum, statuta quandoque varientur humana, præsertim cum urgens necessitas vel evidens utilitas exposcit; quoniam ipse Deus ex his quæ in veteri testamento statuerat, nonnulla mutavit in novo."

In Scotland, the same principle is acknowledged by statutory authority. The education which James I. of Scotland received in England during his captivity, and the vigour of his mind, directed his attention to the improvement of the laws. A statute was accordingly passed, in the brief and homely phraseology of the period, which shall be quoted at full length. It is intituled,† "Of persons to be chosen to examin the buikes of law

\* Sacro Sancta Concilia, tom XI. p. 202. Lateran Council, c. 51. T. De restricta prohibitionem Matrimonii.

† Stat. James I. c. 54. Anno 1425.

Chap. X. "and reforme them:" and, by this act, "it is  
 "statute and ordained, that sex wise men and  
 "discrete, of ilk ane of three estates, quhill  
 "knewis the lawes best, sall be chosen (sen (since)  
 "fraude and guile sucht to help na man), that  
 "sall see and examine the buikes of law; that is  
 "to say, *Regiam Majestatem*, and *Quoniam At-*  
*tachiamenta*; and mend the lawes that needs  
 "mendment."

These observations upon the consequences and tendency of the law of marriage in Scotland, shall be brought to a conclusion, with some remarks by an author of acknowledged talent, who will not be suspected of being prone to any changes in the established system.\* After stating the changes which had taken place in the criminal law of Scotland since the time of Sir George Mackenzie, arising from alterations in the manners and temper and way of thinking of the nation, since that period, and most, justly remarking, (what recent occurrences at the period of the publication sufficiently proved), that the general spirit of criminal law will always be bent to the temper and exigencies of the times, the learned author makes the following comparison between the influence of these causes on the criminal and on the civil law of Scotland: "The law of civil  
 "rights undergoes its changes too, as the state of  
 "a people in regard to its political situation al-

\* Hume's Commentaries, vol. I. Introd. p. 39.

ters ; but the changes are never so rapid, nor Chap. X.  
so extensive, as in the criminal jurisprudence.  
One strong reason for which, is, that with re-  
spect to the former, although it may often be a  
subject of inquiry to the understanding, whe-  
ther one or other practice be the more expe-  
dient ; yet, in the greater number of cases, *our*  
*moral feelings are altogether indifferent* ; which  
they never can be on a question, whether a  
particular action or course of conduct is or is  
not a fit object of punishment. There are some  
of our civil institutions, which, perhaps, might  
be altered with advantage ; but still there is no  
feeling of dislike or abhorrence of the persons  
who enjoy what the present law gives them ;  
nor any very strong sympathy and compassion  
towards those who are deprived of some ad-  
vantages, which, on a different plan, might have  
fallen to their lot. And thus the practice of  
old times extends to the present, without giving  
us any shock or uneasiness. Now, it is quite  
otherwise in the matter of crimes. Take, for  
instance, the case of witchcraft. The possibili-  
ty of such a crime, was once believed ; and the  
methods of detecting it were also thought to be  
properly, and even ingeniously, contrived. But  
we have recovered from this strange and miser-  
able delusion ; and I am sure it will not be dis-  
puted, that even if the statute, which forbids  
any prosecution for this crime, had not been  
enacted, yet, the manners and temper of the

Chap. X. "age, would effectually have abrogated the ancient law, and would have suffered no such trials to be attempted, as our ancestors, at no very distant period, often witnessed without disapprobation."

"From this natural correspondence between the state of the criminal law and the condition of the people as to its manners and ways of feeling, it will easily be understood why Sir George M'Kenzie's treatise should be defective in its application to our present practice. For, at the time of its publication, this country had advanced but little in any sort of improvement; and, indeed, whether we consider it with respect to the administration of its government, its internal discipline and economy, or the opinions, temper, and habits of the people, it was at that time utterly remote from what Scotland has since become."

It cannot escape observation, that the law of marriage is in several respects most intimately connected with criminal jurisprudence; and that consequences of a highly penal nature depend upon the validity of the constitution of marriage. It is a branch of civil jurisprudence, in which our moral feelings "are not altogether indifferent." On the contrary, there is no branch of civil jurisprudence in which these feelings are more strongly excited, and more deeply interested;—and there is no branch of criminal jurisprudence, which, in its administration, produces such general and im-

portant effects upon the moral habits of a nation. Chap. X.

These considerations upon the inexpediency of the law of marriage in Scotland, are now offered to the public. The subject is of the greatest importance in both divisions of the united kingdom. If it has not been brought forward in a manner calculated to excite the attention and inquiries of those who are qualified to judge of this inexpediency, and to guide public opinion upon it, and upon a proper remedy ;—or if the views of the subject, which have now been exhibited, have, from their imperfections, been insufficient to display in their full force, those defects in the law, which it has been plainly insinuated upon high authority, do exist ;—this publication may at least lead to discussions by persons better qualified to do that justice to the subject which it deserves, from its importance to the best interests of the community.











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